# DOCKET

No. 08-214
Title: Atlantic Sounding Co., Inc., et al., Petitioners
v.
Edgar L. Townsend
Docketed: August 20, 2008
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (06-13204)
Decision Date: August 23, 2007
Rehearing Denied: May 27, 2008
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Aug 18 2008 | Petition for a writ of certiorari filed. (Response due September 19, 2008) |
| Sep 16 2008 | Brief amici curiae of American Waterways Operators, et al. filed. |
| Sep 19 2008 | Brief of respondent Edgar L. Townsend in opposition filed. |
| Sep 19 2008 | Brief amicus curiae of Cruise Lines International Association filed. |
| Sep 19 2008 | Brief amicus curiae of United Maritime Group, LLC filed. |
| Sep 22 2008 | Order extending time to file response to petition to and including October 20, 2008. |
| Oct 8 2008 | DISTRIBUTED for Conference of October 31, 2008. |
| Nov 3 2008 | Petition GRANTED. |
| Dec 8 2008 | SET FOR ARGUMENT ON Monday, March 2, 2009. |
| Dec 12 2008 | Motion to dispense with printing the joint appendix filed by petitioners Atlantic Sounding Co., Inc., et al. |
| Dec 18 2008 | Brief of petitioners Atlantic Sounding Co., Inc., et al. filed. |
| Dec 26 2008 | Brief amicus curiae of Cruise Lines International Association filed. |
| Dec 30 2008 | Record received from the U.S.C.A. for the 11th Circuit. (1 envelope) |
| Jan 9 2009 | Record received from the U.S.D.C. for the Middle District of Florida. (1 box) |
| Jan 9 2009 | CIRCULATED. |
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| Jan 21 2009 | Brief of respondent Edgar L. Townsend filed. (Distributed) |
| Jan 26 2009 | Brief amicus curiae of Sailors' Union of the Pacific filed. (Distributed) |
| Jan 26 2009 | Brief amicus curiae of Port Ministries International filed. (Distributed) |
| Jan 26 2009 | Brief amicus curiae of American Association for Justice filed. (Distributed) |
| Feb 19 2009 | Reply of petitioners Atlantic Sounding Co., Inc., et al. filed. (Distributed) |
| Mar 2 2009 | Argued. For petitioners: David W. McCreadie, Tampa, Fla. For respondent: G. J. Rod Sullivan, Jr , Jacksonville, Fla |

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# PETITION FOR WRIT OF CERTIORARI

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In The
# Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

versus

EDGAR L. TOWNSEND,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a seaman recover punitive damages for the willful failure to pay maintenance and cure? The Eleventh Circuit's decision below holds in the affirmative, but conflicts with the Second, Third, Fifth and Ninth Circuits as well as two state courts of last resort, the reasoning of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

## PARTIES TO THE PROCEEDING

Petitioners are Atlantic Sounding Co., Inc. and Weeks Marine, Inc., defendants-appellants below. Respondent is Edgar L. Townsend.

## RULE 29.6 DISCLOSURE

Atlantic Sounding Co., Inc. is a wholly-owned subsidiary of Weeks Marine, Inc. Weeks Marine, Inc. is a privately held corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Atlantic Sounding Co., Inc. and Weeks Marine, Inc. (collectively "Weeks Marine") respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

*Atlantic Sounding Co. v. Townsend*, No. 3:05-CV-649, 2006 WL 4702150 (M.D. Fla. April 20, 2006)

*Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007)

## JURISDICTION

The trial court certified a legal question to the Eleventh Circuit under 28 U.S.C. § 1292(b). On 23 August 2007, the Eleventh Circuit answered the certified question and created conflict with other circuits and two state courts of last resort. On 27 May 2008, the Eleventh Circuit denied Weeks Marine's request for an en banc rehearing. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the Eleventh Circuit's decision.

This Court has exercised its discretion to decide a number of important maritime questions of law that were authorized for review under Sections 1292(b) and 1254(1). *See Norfolk Southern Ry. Co. v. Kirby*,

543 U.S. 14 (2004); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996); *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528 (1995); *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971); *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). The willingness of this Court to examine certified questions is understandable because some of the key criteria utilized for determining whether this Court should exercise its jurisdiction mirror the requirements set forth in Section 1292(b).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, Section 2:

> The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . ."

The Federal Employer's Liability Act, 45 U.S.C. § 51:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier. . . .

The Jones Act, 46 U.S.C. §§ 30104-30105(b):

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law . . . against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.
>
> * * * * *
>
> [A] civil action for maintenance and cure or for damages for personal injury or death may not be brought under a maritime law of the United States if . . . the individual suffering the injury . . . was not a citizen or permanent resident alien of the United States . . . the incident occurred in the territorial waters . . . overlaying the continental shelf of a country other than the United States . . . and the individuals suffering the injury . . . was employed . . . by a person . . . engaged in the exploration . . . of energy resources. . . .

The Death on the High Seas Act, 46 U.S.C. §§ 30302-30303:

> When the death of an individual is caused by wrongful act . . . occurring on the high seas . . . of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. . . . The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by

the individuals for whose benefit the action is brought.

## INTRODUCTION

The Eleventh Circuit held in *Atlantic Sounding Company v. Townsend*, 496 F.3d 1282 (11th Cir. 2007), that seamen may recover punitive damages for their employers' willful failure to pay maintenance and cure. That holding conflicts with four other circuits and two state courts of last resort that decided the same issue. Moreover, *Townsend* fails to follow *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), and *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

In *Miles*, this Court articulated what has subsequently been referred to in admiralty jurisprudence as the "Miles Uniformity Principle." *Miles* teaches that, because Congress has addressed the remedies available to seamen, the courts must defer to Congress and the dominating statutes to determine what remedies are available to seamen under general maritime law. The dominating statutes for seamen are the Jones Act (which incorporates the remedies available under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51) and the Death on the High Seas Act ("DOHSA"), none of which allow for the recovery of punitive damages. 46 U.S.C. § 30104-30105; 46 U.S.C. § 30302.

*Townsend* ignores the Miles Uniformity Principle and allows a punitive damage remedy that is not

provided by any statute governing a seaman's personal injury or death claim. In doing so, *Townsend* conflicts with three circuits and two state courts of last resort that hold the Miles Uniformity Principle either precludes or militates against an award of punitive damages in a maintenance and cure case. *See Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir.) (*en banc*), *cert. denied*, 516 U.S. 1046 (1996); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir.), *cert. denied*, 516 U.S. 1046 (1996); *Stone v. Int'l Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996).

*Townsend* is also in conflict with *Vaughan*. *Vaughan* holds that seamen are entitled to recover attorney's fees for the willful failure to pay maintenance and cure. The *dissent* in *Vaughan* argued that "exemplary damages" should have been awarded. If *Townsend* is traced to its inception, *Townsend's* holding is based on the dubious rationale advanced by three other circuits that the mere mention of "exemplary damages" in the *Vaughan* dissent authorizes punitive damages in a maintenance and cure case. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Manuel v. United States*, 50 F.3d 1253 (4th Cir. 1995); *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585 (6th Cir. 1989). On the other hand, the Second Circuit directly conflicts with *Townsend's* interpretation of *Vaughan* and rejects punitive damages in maintenance and cure cases. *See Kraljic v. Berman Enter.*,

*Inc.*, 575 F.2d 412, 415-16 (2d Cir. 1978) (finding "obvious difficulty" with following a dissenting opinion and holding that no authority permits seamen to recover punitive damages in a maintenance and cure case).

This Court has often stressed the need for uniformity in the interpretation of admiralty law. *See, e.g., Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) ("[F]ederal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country."). In particular, *Miles* instructs that courts throughout the nation should interpret general maritime law in a way that ensures a uniform system of damage remedies for seamen, regardless of the basis of the action or the court in which the lawsuit is filed. The current conflict will promote forum shopping. The Court should take this opportunity to restore uniformity in the application of *Miles* and to ensure that the remedies extended in a maintenance and cure case are consistent, whatever the circuit, whatever the court, throughout the nation.

Finally, Weeks Marine anticipates that Mr. Townsend will assert that *Baker v. Exxon Shipping Company* answers positively the question presented in this case. No. 07-219, 2008 WL 2511219 (June 25, 2008). *Baker* offers no such answer. *Baker* is inapplicable because it analyzes the availability of punitive damages in a vessel pollution case. This case involves whether punitive damages are available in a seaman's maintenance and cure action under general

maritime law in view of the Miles Uniformity Principle and the applicable statutes (the Jones Act, FELA, and DOHSA). Therefore, relying on *Baker* to argue that punitive damages are available to seamen will create further confusion in an area of law that is already burdened with significant conflict.

## STATEMENT OF THE CASE

### I. Factual Background

In the suit below, seaman Edgar L. Townsend's ("Mr. Townsend") asserts that an alleged trip and fall aboard a tugboat gives rise to claims for Jones Act negligence, general maritime law unseaworthiness, and general maritime law maintenance and cure. With respect to his maintenance and cure claim, Mr. Townsend is claiming punitive damages.

### II. Proceedings Below

On 16 March 2006, Weeks Marine filed its Motion to Strike, or, in the Alternative Dismiss Mr. Townsend's Request for Punitive Damages ("Motion to Strike"). Weeks Marine's Motion to Strike included the argument that the Miles Uniformity Principle precluded Mr. Townsend from seeking punitive damages under general maritime law.

The District Court denied the Motion to Strike because, notwithstanding *Miles*, the District Court concluded that it was bound by *Hines v. LaPorte, Inc.*,

820 F.2d 1187 (11th Cir. 1987) (the "Punitive Damages Order"). *Hines* is an Eleventh Circuit decision that cites overruled, pre-*Miles* Fifth Circuit precedent in holding that seamen may recover punitive damages for employers willfully failing to pay maintenance and cure. 820 F.2d at 1189.

Weeks Marine filed its Motion for Reconsideration of the Punitive Damages Order, or Alternatively, Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and Stay. The District Court denied Weeks Marine's request to reconsider its Punitive Damages Order, but granted the request for certification and stay pursuant to 28 U.S.C. § 1292(b). The pure question of law certified by the District Court is, "Whether punitive damages may be legally awarded in a case where maintenance and cure has been arbitrarily and willfully withheld from a seaman?"

The Eleventh Circuit granted Weeks Marine's Petition for Permission to Appeal Pursuant to Section 1292(b). On 23 August 2007, the Eleventh Circuit held that the Miles Uniformity Principle does not control the availability of punitive damages in a maintenance and cure case and reaffirmed *Hines*. *Townsend*, 496 F.3d at 1285-86.

On 11 September 2007, Weeks Marine filed a Petition for Rehearing En Banc. On 27 May 2008, the Eleventh Circuit denied Weeks Marine's request. This Petitions follows.

## REASONS FOR GRANTING THE PETITION

### I. Certiorari Is Appropriate To Resolve A Four-Four Split Among The Circuit Courts

*Townsend* is emblematic of the conflict among the circuit courts that exists on two different levels. As demonstrated below, *Townsend* and the other decisions that allow punitive damages are contrary to the majority opinion in *Vaughan*, 369 U.S. 527, which only authorizes the recovery of attorney's fees. Likewise, *Townsend* is inconsistent with the uniformity principle articulated in *Miles*, 498 U.S. 19.

#### A. Circuit Conflict Exists Regarding Whether The Dissent In *Vaughan* Authorizes Punitive Damages

##### 1. The First and Second Circuits Conflict

In 1962, this Court sanctioned the award of attorney's fees as "necessary expenses" for the willful failure to pay maintenance and cure. *Vaughan*, 369 U.S. at 530-31. Although the majority opinion awarded only attorney's fees as "necessary expenses," the dissent in *Vaughan* sowed the seeds of conflict and confusion by arguing that a seaman should recover "exemplary damages" that "would not necessarily be measured by the amount of counsel fees." *Vaughan*, 369 U.S. at 534-40.

Eleven years later, the First Circuit relied on the dissent's reference to "exemplary damages" to become

the first circuit court in the nation to hold that *Vaughan* authorizes the recovery of punitive damages for the willful failure to pay maintenance and cure. *Robinson*, 477 F.2d at 1051. Without providing a valid explanation, the First Circuit quoted the *Vaughan* dissent in affirming the trial court's decision to permit an award of punitive damages. *Robinson*, 477 F.2d at 1051.

In 1978, the Second Circuit created the initial conflict regarding the recovery of punitive damages for the willful failure to pay maintenance and cure. *Kraljic*, 575 F.2d 412. Unlike the First Circuit, *Kraljic* was troubled by the "obvious difficulty with . . . follow[ing] the views of the dissenters in [*Vaughan*] and not the majority." *Kraljic*, 575 F.2d at 415. Because "the majority [in *Vaughan*] saw fit to go no further than . . . counsel fees," *Kraljic* "fe[lt] constrained to follow [the holding of *Vaughan*]" and reversed the district court's decision to allow punitive damages for the willful failure to pay maintenance and cure. 575 F.2d at 416-17. The conflict between *Kraljic* and *Robinson* remains to this day.

### 2. The Eleventh Circuit Follows *Robinson* And Pre-*Miles* Fifth Circuit Precedent

In 1981, the former Fifth Circuit relied on *Vaughan* and *Robinson* to hold that an injured seaman may recover punitive damages "when a shipowner has

willfully violated the duty to furnish and maintain a seaworthy vessel." *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. Unit B 1981). After the Eleventh Circuit was created, the Fifth Circuit extended *Merry Shipping* by holding that seamen are also entitled to punitive damages for the willful failure to pay maintenance and cure. *See Holmes v. J. Ray McDermott Co.*, 734 F.2d 1110, 1117-18 (5th Cir. 1987).

Similar to the First Circuit, the Fifth Circuit failed to explain why it found the *Vaughan* dissent compelling. *See Holmes*, 734 F.2d at 1118. Notwithstanding the weak underpinnings of the Fifth Circuit's precedent and *Kraljic's* criticism of *Robinson*, the Eleventh Circuit cited *Merry Shipping* and *Holmes* as support for its holding in *Hines* that seamen may recover punitive damages for the willful failure to pay maintenance and cure. *Hines*, 820 F.2d at 1187.

### 3. The Fourth And Sixth Circuits Follow *Robinson*

The Fourth and Sixth Circuits suggest that they follow *Robinson* and not *Kraljic*. *Manuel*, 50 F.3d 1253; *Al-Zawkari*, 871 F.2d 585. In *Manuel*, the Fourth Circuit cites *Robinson* and *Holmes* with approval in confirming that "[p]unitive damages . . . [are] an additional remedy in the seaman's maintenance and cure case." *See Manuel*, 50 F.3d at 1260. Similarly, the Sixth Circuit cites to *Holmes* in

*Al-Zawkari* to explain that seamen may only recover punitive damages when the employer willfully denies maintenance and cure. 871 F.2d at 590, n. 8.

### B. The Miles Uniformity Principle Turns The Tide Against Punitive Damages As A Proper Remedy For Seamen

In *Miles,* the representative of a seaman's estate brought suit against various defendants, including the shipowner, alleging negligence under the Jones Act and breach of the general maritime law warranty of seaworthiness. 498 U.S. at 22. The specific issue before this Court was whether a non-dependent parent could recover non-pecuniary, loss of society damages in a general maritime wrongful death action.

Before deciding the issue, this Court discussed *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, at length because it "exemplifies the fundamental principles that guide [a] decision in [a maritime] case." *Miles*, 498 U.S. at 27. In *Moragne*, this Court recognizes that decisions addressing maritime remedies must ensure consistency with the Jones Act and DOHSA and effectuate "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27. This Court states as follows:

> [W]e no longer live in an era when seamen and their loved ones must look primarily to

> the courts as a source of substantive legal protection from injury and death . . . [I]n this era, . . . Congress retains superior authority in these matters, and *an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. The [Congressional] statutes both direct and delimit [a court's] actions.*

*Miles*, 498 U.S. at 27 (emphasis added).

After confirming that the remedies provided by the Jones Act and DOHSA would "direct and delimit" its actions, this Court analyzed those dominating statutes to determine whether they allow for non-pecuniary, loss of society damages. The Court concluded that DOHSA's prohibition of non-pecuniary damages is clear because Congress specifically limits damages to "pecuniary loss sustained by the persons for whose benefit the suit is brought." *Miles*, 498 U.S. at 31 (citing 46 U.S.C. § 30303). In analyzing the Jones Act, this Court followed previous decisions in concluding that by "[i]ncorporating the FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, 498 U.S. at 32; *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 224 (1996) (confirming that *Miles* recognizes that the Jones Act, which "provides 'action for damages' to '[a]ny seaman who shall suffer personal injury,' permits *compensation only for pecuniary loss*") (emphasis added); *Guevara*, 59 F.3d at 1507, n. 9 (collecting cases including *Pacific S.S. Co. v. Peterson*, 278

U.S. 130, 136-39 (1928), and *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648, 656 (1915)).

Guided by *Moragne's* "fundamental principles" and the knowledge that DOHSA and the Jones Act prohibit seamen from recovering non-pecuniary damages, *Miles* holds that Congress' "explicit limitation [expressed by statute] forecloses recovery for non-pecuniary loss, such as loss of society, in a general maritime action" brought by a seaman. *Miles*, 498 U.S. at 31. *Miles* reasons that "[i]t would be inconsistent with [the Court's] place in the constitutional scheme were [it] to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. . . ." *Miles*, 498 U.S. at 32-33; *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (explaining that in an "area covered by [a] statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries").

*Miles* forcefully explains as follows:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery [for seaman in the Jones Act]. Because the case

> involves . . . a seaman, we must look to the Jones Act.

498 U.S. at 36. Hence, *Miles* "restore[s] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles*, 498 U.S. at 33.

### C. The Post-*Miles* Conflicts In The Federal Circuits

After this Court decided *Miles*, circuit courts addressing the question of the availability of punitive damages for the willful failure to pay maintenance and cure confirmed that the subject was no longer guided solely by the decision of whether to follow *Robinson's* or *Kraljic's* interpretation of *Vaughan*. The first circuit to recognize the relevance of the Miles Uniformity Principle was the Ninth Circuit.

In *Glynn*, the Ninth Circuit analyzes *Vaughan* and *Miles* and holds that a seaman may not recover punitive damages in a maintenance and cure case. *Glynn* flatly rejects *Robinson* and states that it "see[s] no . . . reason why punitive damages, in addition to attorney's fees, should be allowed." *Glynn*, 57 F.3d at 1505. Furthermore, *Glynn* found that "limiting recovery to pecuniary damages [and prohibiting the recovery of punitive damages] is consistent with *Miles*[']" admonishment of attempts to utilize general maritime law to expand the remedies offered to seamen beyond the controlling legislation (i.e., the Jones Act and DOHSA). *Glynn*, 57 F.3d at 1505; *see also In re*

*EXXON VALDEZ*, 270 F.3d 1215, 1226-27 (9th Cir. 2001) (noting that the Ninth Circuit holds that punitive damages are unavailable in a maintenance and cure case for a number of reasons, including recognition in *Glynn* that "under *Miles* . . . we were not free to expand seamen's remedies at will").

Less than one month after *Glynn* was decided, the Fifth Circuit went en banc to analyze whether *Miles* precludes seamen from recovering punitive damages in a maintenance and cure case. *Guevara*, 59 F.3d 1446. The Fifth Circuit recognized that "it should be clear that actions under the general maritime law for *personal injury* are also subject to the *Miles* uniformity principle, as non-fatal actions for personal injury to a seaman are covered by statute – i.e., the Jones Act." *Guevara*, 59 F.3d at 1506 (emphasis in original). Consequently, "[a]fter *Miles*, it is [also] clear that [pre-*Miles* precedent allowing punitive damages] has been effectively overruled. [Pre-*Miles* precedent] . . . is no longer good law in light of the *Miles* uniformity principle because . . . the Jones Act damages limitations control." *Guevara*, 59 F.3d at 1507.

After recognizing that *Miles* "effectively overruled" its previous case law, the Fifth Circuit held that punitive damages are no longer available for the willful failure to pay maintenance and cure. 59 F.3d at 1507-13. Significantly, the Fifth Circuit also warned the Eleventh Circuit that "[o]f course, *Hines'* reliance on [pre-*Miles* precedent] is now analytically problematic because . . . [the decisions were]

effectively overruled by the later decision in *Miles*." 59 F.3d at 1509.

The Eleventh Circuit ignored *Guevara's* shot across the bow and chose to adhere to *Hines* in *Townsend*, 496 F.3d 1282. Contrary to the reasoning of *Miles*, contrary to the holding in *Vaughan*, contrary to the decisions in *Glynn* and *Guevara*, and seemingly untroubled by its "analytically problematic" reliance upon precedent overruled by the Fifth Circuit, the Eleventh Circuit followed *Hines* to hold that punitive damages are available for the willful failure to pay maintenance and cure. *Townsend*, 496 F.3d 1282. *Townsend* is devoid of any meaningful analysis of the conflict that it perpetuates.

Within ten days of the decision in *Townsend*, the Third Circuit reached the opposite result when it decided *Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319. *Kopacz* joins *Glynn* and *Guevara* to hold that *Miles* precludes seamen from recovering punitive damages in a maintenance and cure case. 248 Fed. App'x at 323. *Kopacz* explains as follows:

> Although the *Miles* case addressed a wrongful death action brought under general maritime law, the holding is applicable in this case because the failure to provide maintenance and cure is similarly a 'judicially created cause of action in which liability is without fault.'

248 Fed. App'x at 323. Thus, the Third Circuit "follow[s] the majority of courts" by recognizing that the

Miles Uniformity Principle precludes seamen from receiving punitive damages for the willful failure to pay maintenance and cure. *Kopacz*, 248 Fed. App'x at 323.

### D. The Four-Four Circuit Conflict Provides A Compelling Reason For Granting The Petition

The Court should grant the writ of certiorari in this case because *Townsend* impermissibly expands the holding of *Vaughan*, improperly fails to apply the Miles Uniformity Principle, and brings into sharp focus the four-four split among the circuits regarding the availability of punitive damages in a maintenance and cure case. *Compare Kopacz*, 248 Fed. App'x 319, *Guevara*, 59 F.3d 1496, *Glynn*, 57 F.3d 1495, *and Kraljic*, 575 F.2d 412 *with Townsend*, 496 F.3d 1282, *Manuel*, 50 F.3d 1253, *Al-Zawkari*, 871 F.2d 585, *and Robinson*, 477 F.2d 1048. This issue is ripe for review.

## II. Certiorari Is Appropriate To Resolve The Conflict Between *Townsend* And Two State Courts Of Last Resort

*Townsend* not only conflicts with the Third, Fifth and Ninth Circuit's post-*Miles* decisions, but also conflicts with the decisions of two state courts of last resort that have interpreted *Miles* as foreclosing a seaman's ability to recover punitive damages in a maintenance and cure case. *See Stone*, 918 P.2d 55; *Waiters*, 917 S.W.2d 17. Contrary to *Townsend*, the

Supreme Court of Alaska followed the "Fifth and Ninth Circuits" to hold that "allowing the recovery of punitive damages in a maintenance and cure case would be inconsistent with the principles set forth in *Miles*." *Stone*, 918 P.2d at 556.

Similarly, the Supreme Court of Texas concludes in *Waiters* that *Guevara* "accurate[ly] state[s]" the impact of *Miles*. 917 S.W.2d at 18. "Punitive damages, like loss of society damages, are nonpecuniary losses and are not recoverable under the Jones Act." *Waiters*, 917 S.W.2d at 18. Consequently, to "award punitive damages in maintenance and cure claims involving personal injuries would be inconsistent with remedies for those injuries available under the Jones Act." *Waiters*, 917 S.W.2d at 18.

*Townsend* conflicts with two state supreme courts deciding this important federal question and provides an additional reason why this Court should grant the petition.

## III. Certiorari is Appropriate Because the Constitution and the Jones Act Require Uniform Remedies for Seamen

### A. This Court Consistently Recognizes the Need For Uniformity in General Maritime Law

"[S]ince the birth of this Nation," maritime commerce has been recognized as its "jugular vein." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (quoting F. Frankfurter & J. Landis, *The*

*Business of the Supreme Court* 7 (1927)). Because of the importance of maritime commerce, maritime law has a "more powerful constitutional basis than other federal law" and "[t]he need for a body of [maritime] law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." Charles M. Davis, *Federal Supersession of State Workers' Compensation Acts as Applied to Jones Act Seamen*, 8 U.S.F. Mar. L.J. 185, 191-92 (1996) (explaining how the Commerce, Supremacy, and Admiralty Clauses all allocate powers to Congress and the federal courts to allow for the uniform laws that govern maritime commerce); *Deep Sea Research*, 523 U.S. at 501; *see also Kirby*, 543 U.S. at 25 ("[w]e have reiterated that the 'fundamental interest giving rise to maritime jurisdiction is the protection of maritime *commerce*' ") (quoting *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)). This Court explains as follows:

> Article III's grant of admiralty jurisdiction " 'must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed. . . .' "

*Kirby*, 543 U.S. at 28 (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna*, 88 U.S. 558, 575 (1875)). Accordingly, nothing is more settled than the need for uniformity in maritime law.

Because of the Constitutional need to ensure a system of coextensive maritime law throughout the nation, this Court frequently exercises its jurisdiction to correct conflicting jurisprudence regarding maritime remedies. *See, e.g., Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996); *Miles*, 498 U.S. 19; *Higginbotham*, 43 U.S. 618. Moreover, this Court's duty to ultimately declare uniform law is heightened when the question at issue involves "the determination of employer liability to seamen" because the "Jones Act adopts the 'uniformity requirement' of the FELA," which requires all federal and state courts to consistently apply the statute that governs seamen's legal remedies. *Miller*, 510 U.S. at 455-56.

### B. Lower Federal And State Court Decisions Confirm That The Law Is Not Uniform

Despite this Court's articulated desire to ensure uniform remedies for seamen, the law is anything but uniform. To be blunt, the law is a conflicting mess and ripe for forum shopping. *See, e.g.*, Robert Force, *The Legacy of Miles v. Apex Marine Corp.*, 30 Tul. Mar. L.J. 35, 42 (2006) (discussing the conflicts that exist among 116 federal cases and numerous state cases that analyze the affect of the Miles Uniformity Principle on plaintiffs' claims for non-pecuniary damages (punitive or loss of society damages)); Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 6-34 (4th ed. 2004) (collecting a substantial

number of conflicting pre- and post-*Miles* decisions that address the availability of punitive and loss of society damages for seamen).

Consider the example of a seaman sailing the waters of the United States. As the seaman travels on a clockwise voyage, starting in the Northeast and bound for the West Coast, the supposedly "uniform remedies" available to the seaman change on an almost state-by-state basis.

The trip begins in Maine, where the First Circuit approves of punitive damages in a general maritime law maintenance and cure case, but paradoxically, recognizes that the Miles Uniformity Principle precludes the recovery of punitive damages in a personal injury, general maritime law unseaworthiness claim. *Compare Robinson*, 477 F.2d at 1051 *and Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993) (reaffirming the ability of seamen to recover punitive damages) *with Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994) (following the reasoning of *Miles* and precluding seamen from recovering punitive damages or loss of society damages because they are non-pecuniary damages). District courts within the First Circuit either suggest that *Robinson* remains good law or deny that *Miles* precludes the recovery of punitive damages in a maintenance and cure case. *See Williamson v. Horizon Lines, LLC*, Civil No. 06-119-B-W, 2008 WL 2222055, at *2 (D. Me. Feb. 26, 2008) (noting that a seaman may recover punitive damages); *Smith v. Mar*, 877 F. Supp. 62, 67 (D. R.I.

1995) (denying that *Miles* precludes the recovery of punitive damages).

The right to recover punitive damages ends as a seaman sails into New York Harbor or along the Delaware River.[1] *Kraljic*, 575 F.2d at 415-16; *Kopacz*, 248 Fed. App'x 319. However, further complexity arises as the seaman's vessel continues south and enters the waters of Virginia, North Carolina, or South Carolina. The Fourth Circuit suggests approval of *Robinson* and confirms that seamen may recover punitive damages, but published district court opinions within the Fourth Circuit conflict. *Compare Manuel*, 50 F.3d 1253 *and Lady Deborah, Inc. v. Ware*, 855 F. Supp. 871, 871, n. 1 (E.D. Va. 1994) (generally stating that seamen may recover punitive damages in a maintenance and cure case) *with Boyd v. Cinmar of Gloucester, Inc.*, 919 F. Supp. 208, 209-11 (E.D. Va. 1996) (recognizing that *Manuel* exists, but holding that *Miles* precludes the recovery of punitive damages in a maintenance and cure case) *and Carolina Clipper, Inc. v. Axe*, 902 F. Supp. 680, 683-84 (E.D. Va. 1995) (same).

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[1] Because the Third Circuit "by tradition does not cite to its not precedential opinions as authority," litigants along the Delaware River could technically argue that they are not bound to follow *Kopacz's* bar on punitive damages. Third Circuit Internal Operating Procedures Rule 5.7. The ability of litigants to rely upon *Kopacz's* designation as "not precedential" to seek an opposite result further complicates the current status of the law and adds to the reasons for accepting this petition.

Once the voyage down the East Coast reaches Georgia, punitive damages are allowed pursuant to *Townsend*. However, as discussed in Section I.C. above, the precedent relied upon by the Eleventh Circuit was overruled by the Fifth Circuit. *See Townsend*, 496 F.3d 1282; *Guevara*, 59 F.3d at 1509 ("[o]f course, *Hines'* reliance on [pre-*Miles*, Fifth Circuit precedent] is now analytically problematic because . . . [those decisions were] effectively overruled by the later decision in *Miles*").[2] Prior to *Townsend*, district courts in Georgia recognized that *Hines* was no longer good law and the Miles Uniformity Principle precluded seamen from recovering punitive damages. *See Ponder v. M/V CHILBAR*, 2002 AMC 2022 (S.D. Ga. 2002); *Blige v. M/V GEECHEE GIRL*, 180 F. Supp. 2d 1349 (S.D. Ga. 2001).

Seamen stopping in Florida's ports are greeted with decisions that create a county-by-county conflict. *Compare Nurkiewicz v. Vacation Break U.S.A., Inc.*, 771 So. 2d 1271 (Fla. Dist. Ct. App. 2000) (recognizing

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[2] Courts within the Eleventh Circuit are "guided" by a decision that adopts the rationale of overruled decisions and must also attempt to reconcile that the Eleventh Circuit relies on the Miles Uniformity Principle to hold that seamen may not recover any form of non-pecuniary damages in a personal injury, unseaworthiness claim. *Lollie v. Brown Serv. Inc.*, 995 F.2d 1565 (11th Cir. 1993) (per curiam). No logical reason exists for applying the Miles Uniformity Principle to the general maritime law claim of unseaworthiness, but not applying the same reasoning to a general maritime law maintenance and cure claim – both of which are no-fault remedies for injured seamen.

that the reasoning of *Miles* precludes seamen from recovering punitive damages) *with Norwegian Cruise Lines, Ltd. v. Zareno*, 712 So. 2d 791 (Fla. Dist. Ct. App. 1998) (including dicta that confirms the availability of punitive damages) *and Kloster Cruise Ltd. v. Segui*, 679 So. 2d 10 (Fla. Dist. Ct. App. 1996) (recognizing that *Guevara* and *Miles* may have undermined its previous precedent approving of punitive damages, but (like the Eleventh Circuit) deciding to follow pre-*Miles* precedent).

Not only have Florida state courts failed to consistently apply the Miles Uniformity Principle, but the existence of *Townsend* also creates forum shopping opportunities for seamen analyzing whether to file in state or federal court. Seamen that file lawsuits within the same Florida county could find punitive damages denied in state court while the federal court within that county might feel compelled to follow *Townsend*.

A visit to the Gulf of Mexico returns the seaman to a geographical region where punitive damages are unavailable. The Fifth Circuit, which has undertaken the most thorough and consistent analysis of *Miles*, holds that punitive damages are not recoverable. *Guevara*, 59 F.3d 1496; *see also Murray v. Anthony J. Bertucci Constr., Inc.*, 958 F.2d 127 (5th Cir.), *cert. denied*, 506 U.S. 865 (1992) (stating that the "reasoning [of *Miles*] applies with equal force to a seaman's claim for injuries" and holding that "[a]s a result, the Jones Act limits a seaman's recovery for injury to pecuniary losses and precludes any recovery for

non-pecuniary losses, such as loss of society"); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992) (same); *Waiters*, 917 S.W.2d 17.

As the seaman leaves the Gulf of Mexico and continues the voyage up the Mississippi River, the availability of punitive damages is equally uncertain. Like the First and Eleventh Circuits, the Sixth Circuit's jurisprudence is inconsistent with respect to the availability of punitive damages under general maritime law. Specifically, the Sixth Circuit asserts that punitive damages are available in a maintenance and cure action (*see Al-Zawkari*, 871 F.2d 585), but utilizes the Miles Uniformity Principle to hold that punitive damages are not available in a wrongful death action alleging unseaworthiness. *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 510 U.S. 915 (1993); *see also Hoeffling v. U.S. Steel*, 792 F. Supp. 1029, 1030 (E.D. Mich. 1991) (recognizing that "[t]here is a noticeable absence of case authority in the Sixth Circuit on this issue," but relying on *Al-Zawkari* to hold that punitive damages are available in a maintenance and cure case).

Further up the river, the Seventh and Eighth Circuits have not addressed the issue and the district courts along the Mississippi's banks have failed to provide a uniform answer. *Compare Frost v. TECO Barge Lines*, No. 04-CV-00752-DRH, 2005 WL 1389118, at *2 (S.D. Ill. June 1, 2005) (denying the recovery of punitive damages by seamen and stating that "[w]hile the Seventh Circuit has not considered whether punitive damages are available

under general maritime law," "[t]he court finds the reasoning of the Fifth and Ninth Circuits persuasive on this issue"); *Watters v. Harrah's Illinois Corp.*, 993 F. Supp. 667 (N.D. Ill. 1998) (denying the recovery of punitive damages by seamen), *and Owens v. Conti-carriers & Terminals, Inc.*, 591 F. Supp. 777 (W.D. Tenn. 1984) (adopting the reasoning of *Kraljic* in denying the recovery of punitive damages by seamen) *with McNeil v. Jantran, Inc.* 258 F. Supp. 2d 926, 931 (W.D. Ark. 2003) (stating in dicta that an employer is liable for punitive damages for the willful failure to pay maintenance and cure) *and White v. Am. River Transp. Co.*, 853 F. Supp. 300 (S.D. Ill. 1993) (analyzing *Miles*, but holding that seamen may recover punitive damages for the willful failure to pay maintenance and cure).

Last, employers and seamen operating in the Pacific Ocean receive the benefit of a uniform answer regarding the recoverability of punitive damages in a maintenance and cure case. The uniformity results only because California, Oregon, Washington, Hawaii and Alaska are all within the Ninth Circuit. Consequently, *Glynn* controls and seamen are precluded from recovering punitive damages. 57 F.3d 1495; *Stone*, 918 P.2d 551.

### C. Review Of *Townsend* Allows This Court To Restore The Uniformity Required By The Constitution And The Jones Act

The Petitioners' survey of federal and state case law throughout the nation is not exhaustive. However, the survey highlights the multiple conflicts that exist within a body of law where the Constitution requires uniformity. This case provides the opportunity for the Court to restore the uniformity in maritime remedies that the Constitution and the Jones Act require. This Court should address the nationwide conflict, which allows for forum shopping at the state and federal levels, and provide one answer regarding whether a seaman may recover punitive damages in a maintenance and cure case.

## IV. Certiorari Is Appropriate Because *Baker* Does Not Resolve The Conflict

Weeks Marine anticipates that Mr. Townsend will argue that this Court's recent decision in *Baker v. Exxon Shipping Company* undermines the Miles Uniformity Principle and supports the argument that seamen may recover punitive damages in a maintenance and cure claim. 2008 WL 2511219, at *1. In addition to the Ninth Circuit's explicit recognition that its holding in *Baker* was distinguishable from *Glynn*, an analysis of this Court's reasoning in *Baker* further confirms that *Baker* does not speak to the current eight circuit conflict. *See In re EXXON VALDEZ*, 270 F.3d at 1226-27 (emphasizing that "*Glynn* was about maintenance and cure" and "is clearly

distinguishable" from analyzing the availability of punitive damages in a vessel pollution case). Any reference to *Baker* will simply create additional confusion regarding the effect of *Miles*.

*Baker* addresses Exxon's argument that the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, prevents private individuals from recovering punitive damages in a general maritime law claim arising out of the EXXON VALDEZ's pollution of Prince William Sound in Alaska. 2008 WL 2511219, at *8-10. Unlike the Jones Act and its maintenance and cure counterpart (both of which protect seamen), the CWA did not preempt the plaintiffs' claims in *Baker* because the statute protects the "water" and "shorelines" and not "private individuals."[3] *Baker*, 2008 WL 2511219, at *10. Consequently, this Court "f[ound] it too hard to

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[3] Other distinguishing factors exist. Contrary to the CWA, the Jones Act specifically references the general maritime law claim (maintenance and cure) that Weeks Marine asserts is displaced by Congress. *See* 46 U.S.C. § 30105(b) (describing "civil action[s]" controlled by the restrictions of subsection (b) as actions "for maintenance and cure or for damages for personal injury or death . . . "); *see also Guevara*, 59 F.3d at 1511, n. 14 (relying upon the language of 46 U.S.C. § 30105(b) as further support for deciding that the Jones Act and a tort-like maintenance and cure action overlap). Additionally, unlike the question of first impression presented in *Baker*, the Jones Act is steeped in a rich history of Supreme Court and circuit court precedent that unanimously finds Congress intended the Jones Act (and FELA) to sanction the recovery of compensatory damages only. *See Zicherman*, 516 U.S. at 224; *Miles*, 498 U.S. at 32; *Peterson*, 278 U.S. at 136-39; *Craft*, 237 U.S. at 656; *Guevara*, 59 F.3d at 1507, n. 9 (collecting cases).

conclude that a statute expressly geared to protecting . . . 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring . . . private individuals." *Baker*, 2008 WL 2511219, at *10.

*Baker* also differs from this Court's previous analysis of the dominating statutes for seaman in that the CWA includes a "saving clause reserving 'obligations . . . under any provision of law for damages to any . . . privately owned property resulting from a discharge of any oil.'" *Baker*, 2008 WL 2511219 at *10 (quoting 33 U.S.C. § 1321(o)). Common sense dictates that this Court would not have needed to address the effect of the Jones Act on seamen's general maritime law remedies if that statute included a "saving clause." *See Miles*, 498 U.S. 19.

In short, *Baker* does not settle the conflict. Courts should continue to follow *Miles* in maintenance and cure cases because the CWA is not analogous to the dominating statutes applicable to seamen. *Baker's* analysis has nothing to do with this Court's mandate that "*an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation*" for seamen. *Miles*, 498 U.S. at 27 (emphasis added). Those circuit courts that refuse to apply the Miles Uniformity Principle may, perhaps, find comfort in *Baker* because it permits an award of punitive damages. Ultimately, *Baker* settles nothing concerning the application of the Miles Uniformity Principle to seamen's claims, does not create the uniformity of law among the circuits required by the Constitution, and makes no attempt

to settle the conflict created by *Vaughan*. Therefore, this Court's guidance on whether the Miles Uniformity Principle precludes the recovery of punitive damages in a maintenance and cure case remains the only hope for creating a uniform rule of law for seamen and maritime employers throughout the United States.

## CONCLUSION

This Court should grant the petition and exercise its jurisdiction.

Respectfully submitted,

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Dated: 18 August 2008

496 F.3d 1282

United States Court of Appeals, Eleventh Circuit.
ATLANTIC SOUNDING CO., INC., Weeks Marine, Inc., Plaintiffs-Counter-Defendants-Appellants,
v.
Edgar L. TOWNSEND,
Defendant-Counter-Claimant-Appellee,
Thomas Kimbrough, Defendant.
**No. 06-13204.**

Aug. 23, 2007.

David W. McCreadie, Eddie G. Godwin, Michael Kestenbaum, Lau, Lane, Pieper, Conley & McCreadie, P.A., Tampa, FL, for Plaintiffs-Counter-Defendants-Appellants.

Gerard Joseph Sullivan, Jr., Sullivan & Co., Jacksonville, FL, for Townsend.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON, Chief Judge, and CARNES and FAY, Circuit Judges.

EDMONDSON, Chief Judge:

In this interlocutory appeal, Plaintiffs-Appellants Atlantic Sounding Co., Inc., and Weeks Marine, Inc. ("Plaintiffs") appeal the district court's denial of Plaintiffs' motion to strike Defendant-Appellee Edgar L. Townsend's ("Defendant") request for punitive damages. The district court concluded that it was bound by our prior panel decision in *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir.1987), which

permits a seaman to recover punitive damages when an employer arbitrarily and willfully refuses to pay maintenance and cure. Plaintiffs contend that *Hines* was abrogated by *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), in which the Supreme Court concluded that recovery for non-pecuniary loss in the wrongful death of a seaman was not available under general maritime law. We conclude that our prior decision in *Hines* remains binding law in this Circuit; therefore, we affirm.

On 5 July 2005, Defendant, a seaman and crew member of the Motor Tug Thomas, allegedly slipped and landed shoulder first on the steel deck of the vessel, injuring his shoulder and clavicle. According to Defendant, Plaintiffs advised him that they would not provide him with maintenance and cure, which covers medical care, a living allowance, and wages for seamen who become ill or are injured while serving aboard a vessel.[1] Plaintiffs then filed this suit for

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[1] In *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir.1995), we described this kind of cause of action:

> The seaman's action for maintenance and cure may be seen as one designed to put the sailor in the same position he would have been had he continued to work: the seaman receives a maintenance remedy, because working seamen normally are housed and fed aboard ship; he recovers payment for medical expenses in the amount necessary to bring him to the maximum cure; and he receives an amount representing his unearned wages for the duration of his voyage or contract period.

declaratory relief on the question of their obligations in this matter.

Two days later, Defendant filed suit against Plaintiffs pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law, alleging negligence, unseaworthiness, arbitrary and willful failure to pay maintenance and cure, and wrongful termination. He then filed the same claims as counterclaims to the declaratory judgment action and sought punitive damages on his maintenance and cure claim. The district court later consolidated the two actions.

Plaintiffs moved to strike or to dismiss Defendant's request for punitive damages. Plaintiffs contended that, under *Miles,* neither the Jones Act nor general maritime law provides a cause of action against an employer for non-pecuniary damages. The district court denied Plaintiffs' motion, concluding that it was bound by our rule in *Hines*. The district court later denied Plaintiffs' motion for reconsideration of the issue, but certified the question for review on interlocutory appeal.

Whether punitive damages may be recovered in maintenance and cure actions is a question of law that we review *de novo*. *See Tucker v. Fearn,* 333 F.3d 1216, 1218 n. 2 (11th Cir.2003). The central question here is whether we may depart from our prior ruling in *Hines,* based on the Supreme Court's intervening decision in *Miles*; we conclude that we may not.

Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision

only when the intervening Supreme Court decision is "clearly on point." *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees,* 344 F.3d 1288, 1290-92 (11th Cir.2003) (concluding that an intervening Supreme Court decision did not "implicitly overrule" a prior circuit decision because the cases dealt with different issues and were not "clearly inconsistent"). The Supreme Court reminds us that "[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding." *Crawford-El v. Britton,* 523 U.S. 574, 118 S.Ct. 1584, 1590, 140 L.Ed.2d 759 (1998). So, that the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision. As we have stated, "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.,* 475 F.3d 1228, 1230 (11th Cir.2007) (concluding that the Supreme Court's determination that the time requirement in Fed.R.Crim.P. 33 was not jurisdictional did not "relieve[ ] us from the obligation to follow our prior panel decisions holding that the requirements of Appellate Rule 5 are jurisdictional"); *see also Smith v. GTE Corp.,* 236 F.3d 1292, 1303 (11th Cir.2001) ("[W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time."); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs,* 87 F.3d 457, 462 (11th

Cir.1996) ("[W]e are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.").

In *Hines,* a panel of this Court determined that, in an action for maintenance and cure, "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case" – that is, upon a showing of a shipowner's willful and arbitrary refusal to pay maintenance and cure. *Hines,* 820 F.2d at 1189. In reaching this conclusion, we relied mainly on four cases: *Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); *Complaint of Merry Shipping, Inc.,* 650 F.2d 622 (5th Cir. Unit B 1981); *Holmes v. J. Ray McDermott & Co.,* 734 F.2d 1110 (5th Cir.1984); and *Robinson v. Pocahontas, Inc.,* 477 F.2d 1048 (1st Cir.1973). We started with the proposition that *Vaughan* "permitted a seaman to recover reasonable counsel fees when the shipowner's default in the duty to provide maintenance and cure was willful and persistent." *Hines,* 820 F.2d at 1189.[2] We then noted that we had previously concluded in *Merry Shipping* that "punitive damages [were] recoverable under general maritime law upon a showing of a shipowner's willful and wanton misconduct in a death action." *Id.* And we noted that the Fifth Circuit had

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[2] We did, however, acknowledge that it was unclear whether the *Vaughan* majority regarded attorney's fees as an item of compensatory damages or as a punitive measure. *See Hines,* 820 F.2d at 1189.

extended the *Merry Shipping* rule to maintenance and cure actions in *Holmes* and that the First Circuit also allowed punitive damages in similar circumstances. *Id.* While stating that *Vaughan* was not dispositive because it considered only attorney's fees, we decided to follow the Fifth Circuit in adopting the reasoning of *Merry Shipping* and extending *Vaughan*'s rule to punitive damages in maintenance and cure actions. *Id.*

Three years later in *Miles,* the Supreme Court "conclude[d] that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Miles,* 111 S.Ct. at 326. In reaching this conclusion, the Court made this observation:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.

*Id.* at 323. Then, taking note that neither the Jones Act nor the Death on the High Seas Act ("DOHSA"),

46 U.S.C. §§ 761, 762 – both of which provide causes of action for the wrongful death of a seaman – permits the recovery of non-pecuniary losses, such as loss of society, the Court stated that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 326. Therefore, the Court denied the recovery sought and "restore[d] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.*

Plaintiffs argue that "[t]he *Miles* uniformity principle dictates that all subsequent courts determining the availability of damages in a maritime case must provide for uniform results in similar factual settings, regardless of whether the action is brought pursuant to the Jones Act, DOHSA, or general maritime law." Under this principle, Plaintiffs reason, Defendant cannot recover punitive damages for a general maritime maintenance and cure cause of action because he would not be able to recover punitive damages – which are non-pecuniary in nature – under the Jones Act. But this argument can only be based on the reasoning of the *Miles* opinion, not on the *Miles* decision: its holding. *Miles* says and – more important – decides nothing about maintenance and cure actions or punitive damages. *See Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.) ("[G]eneral expressions, in

every opinion, are to be taken in connection with the case in which those expressions are used.") For this reason, the *Miles* decision provides no basis for this panel to depart from *Hines* under our prior panel precedent rule. *See Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279, 1283 (5th Cir.1994), *rev'd in part on reh'g*, 59 F.3d 1496 (1995) ("Maritime's argument that *Miles* abrogates this Circuit's rule [announced in *Holmes*] permitting the recovery of punitive damages in maintenance and cure cases obviously cannot rest upon the specific holding in *Miles*. . . . *Miles* did not involve maintenance and cure or punitive damages."); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1503 (9th Cir.1995) ("Because *Miles* did not consider the availability of punitive damages, and was not faced with a claim for maintenance and cure that has no statutory analog, it does not directly control the question of whether punitive damages are available for the willful failure to pay maintenance.").[3] Therefore, the district court did not err in

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[3] Even those courts that have extended *Miles* to factual situations that are more similar to that presented in *Miles* have recognized that they do so under the reasoning, rather than the holding, of the Supreme Court's opinion. *See, e.g., Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 202-03 (1st Cir.1994) (relying on the "rationale" and "analysis" of *Miles* to conclude that seaman who had suffered nonfatal injuries could not recover punitive damages in an unseaworthiness action under general maritime law); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1455, 1459 (6th Cir.1993) (concluding that punitive damages are not available in general maritime law unseaworthiness action for wrongful death of a seaman, after stating that

(Continued on following page)

following *Hines* – the law of this Circuit – and in denying Plaintiffs' motion to strike Defendant's request for punitive damages.

AFFIRMED.

CARNES, Circuit Judge, concurring:

I join Chief Judge Edmondson's opinion in its entirety. For the reasons it explains and on the basis of the decisions it cites, we are obligated to follow our prior precedent in *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir.1987). We must follow *Hines*' specific holding that punitive damages are available where there is a willful and persistent failure to pay maintenance and cure, 820 F.2d at 1189-90, even though this Court might have decided that issue differently if *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), had been available at the time it first arose.

The prior panel precedent rule is a fundamental ground rule that embodies the principle of adherence to precedent. It promotes predictability of decisions and stability of the law, it helps keep the precedential peace among the judges of this Court, and it allows us to move on once an issue has been decided. Without the rule every sitting of this court would be a series of do-overs, the judicial equivalent of the movie "Groundhog Day." While endlessly recurring fresh

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*Miles*'s "reasoning, if not its holding, seems to cover the type of damages before us").

starts is an entertaining premise for a romantic comedy, it would not be a good way to run a multi-member court that sits in panels. As a panel, we must follow our holding in *Hines* instead of any inferences we may draw from the Supreme Court's reasoning in deciding a different issue in *Miles* because the prior precedent rule requires that we do so, and we take that rule seriously.

At the same time, of course, we are obligated to take Supreme Court decisions seriously, very seriously. Our obligation to do so flows from the constitutional plan of "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain." U.S. Const. Art. III, § 1; *see Schwab v. Crosby,* 451 F.3d 1308, 1325 (11th Cir.2006) ("We have always believed that when the Founders penned Article III's reference to the judicial power being vested 'in one supreme Court and in such inferior Courts' as Congress may establish, they used 'supreme' and 'inferior' as contrasting adjectives, with us being on the short end of the contrast." (citation omitted)), *cert. denied,* ___ U.S. ___, 127 S.Ct. 1126, 166 L.Ed.2d 897 (2007).

The duty of a later panel of this Court to follow an earlier one's decision ends when that decision conflicts with the holding of a later Supreme Court decision. If *Miles* had held that punitive damages were not available for the willful failure to pay maintenance and cure, we certainly would follow that holding instead of our contrary one in *Hines,* even if the *Miles* opinion did not mention the *Hines* decision.

*See In re Provenzano,* 215 F.3d 1233, 1235 (11th Cir.2000); *Davis v. Singletary,* 119 F.3d 1471, 1482 (11th Cir.1997); *United States v. Hogan,* 986 F.2d 1364, 1369 (11th Cir.1993). But *Miles* held nothing about maintenance and cure or punitive damages. It addressed the different issue of whether damages for loss of society are recoverable in a general maritime cause of action for the wrongful death of a seaman, deciding that they were not. 498 U.S. at 37, 111 S.Ct. at 328.

The contention of the appellants in this case is not that the *Miles* holding is contrary to the *Hines* holding, but that the reasoning the Supreme Court used to reach its holding in *Miles,* 498 U.S. at 30-33, 111 S.Ct. at 324-26, is inconsistent with the holding in *Hines,* 820 F.2d at 1189-90. The argument does not pit holding against holding, but reasoning against holding. The broader question this argument presents is whether, and if so when, a panel of this Court may vary from a specific holding of an earlier one based on the reasoning the Supreme Court used to reach a later decision on a different issue.

That question is not particularly difficult in this case because even if there is some tension between the two, it is far from clear that *Miles'* reasoning conflicts with *Hines'* holding. At least a half dozen courts have held that *Miles* does not compel the conclusion that punitive damages are unavailable in maintenance and cure cases. *See Glynn v. Roy Al Boat Mgmt. Corp.,* 57 F.3d 1495, 1503 (9th Cir.1995) (concluding that *Miles* "does not directly

control the question of whether punitive damages are available for the willful failure to pay maintenance" but deciding that punitive damages are unavailable for another reason); *Smith v. MAR, Inc.*, 877 F.Supp. 62, 67 (D.R.I.1995) (noting that "*Miles* has not stated that punitive damages are unavailable in a claim for maintenance and cure," and concluding that "plaintiff's claim for punitive damages for the agent's arbitrary and willful conduct in failing to pay maintenance and cure is a viable claim post *Miles*"); *White v. Am. River Transp. Co.*, 853 F.Supp. 300, 301 (S.D.Ill.1993) ("As a purely judicial remedy, maintenance and cure has no statutory counterpart. Consequently, it does not defeat *Miles*' goal of uniformity to permit nonpecuniary damages in conjunction with a claim for maintenance and cure."); *Ortega v. Oceantrawl, Inc.*, 822 F.Supp. 621, 624 (D.Alaska 1992) ("*Miles* does not extend to preclude a claim for exemplary damages in regard to a claim for maintenance and cure."); *Ridenour v. Holland Am. Line Westours, Inc.*, 806 F.Supp. 910, 911, 913 (W.D.Wash.1992) (concluding that "*Miles* is not dispositive as to the availability of punitive damages for willful withholding of maintenance and cure" and holding that "punitive damages are available in an action for maintenance and cure"); *Anderson v. Texaco, Inc.*, 797 F.Supp. 531, 536 (E.D.La.1992) (concluding that the availability "punitive damages for willful failure to pay maintenance and cure, a firmly rooted general maritime law claim, is unaffected by *Miles* because failure to pay is a contractual claim not reached by any maritime statute").

Other courts have decided differently. *See Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1512 (5th Cir.1995) (en banc) (relying on *Miles* to overrule a prior panel decision and hold that "punitive damages [are] not . . . available in any action for maintenance and cure" (emphasis omitted)); *In re J.A.R. Barge Lines, L.P.*, 307 F.Supp.2d 668, 673 (W.D.Pa.2004) ("Under the *Miles* uniformity principle, then, punitive damages are unavailable in maintenance and cure actions under general maritime law."); *Blige v. M/V GEECHEE GIRL*, 180 F.Supp.2d 1349, 1355 (S.D.Ga.2001) (same); *Watters v. Harrah's Ill. Corp.*, 993 F.Supp. 667, 676-77 (N.D.Ill.1998) (citing cases coming down on different sides of the issue, but deciding that "[p]ursuant to the *Miles* uniformity principle, punitive damages are not recoverable in the tort-like maintenance and cure action" and that "punitive damages should not be recoverable in a contract-like maintenance and cure action if they are not recoverable in a tort-like maintenance and cure action"); *Boyd v. Cinmar of Gloucester, Inc.*, 919 F.Supp. 208, 209-10 (E.D.Va.1996) ("extending" the Supreme Court's ruling in *Miles* to bar recovery of punitive damages in maintenance and cure actions).

The bottom line is that courts are divided over whether the reasoning of *Miles* conflicts with a holding that punitive damages are available in maintenance and cure actions. At least where reasonable jurists may disagree about whether a later Supreme Court decision compels a different answer to an issue

decided by an earlier panel, later panels should follow the existing circuit precedent. That is the case here.

Of course, even if an intervening Supreme Court decision does not conflict with a prior panel precedent to the extent of overruling it, en banc rehearing may be granted for the purpose of addressing the issue afresh in light of the reasoning or implications of the Supreme Court decision. Whether to do that, however, is a different question.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN ADMIRALTY

**ATLANTIC SOUNDINGS COMPANY, INC. et. al,**

Plaintiffs,

v.

**EDGAR TOWNSEND,**

Defendant.

**Case No. 3:05-cv-649-J-20HTS CONSOLIDATED**

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**EDGAR TOWNSEND,**

Plaintiff,

v.

**WEEKS MARINE, INC.,**

Defendant.

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## ORDER

(Filed Apr. 25, 2006)

Before the Court is Atlantic Soundings Co. Inc.'s and Weeks Marine Inc.'s ("AS & WM") Motion for Reconsideration of 7 April 2006 Order Denying Motion to Strike Punitive Damages Or, Alternatively, Motion for Certification Pursuant to 28 U.S.C. § 1292(b) And Stay (Doc. No. 45, filed April 12, 2006), to which Edgar Townsend responded in opposition (Doc. No. 46, filed April 12, 2006). For the following

reasons, the Court **denies** the Motion for Reconsideration, but **grants** the Motion for Certification, pursuant to Section 1292(b), and **stays** the current proceedings in this Court, pending further proceedings by the Court of Appeals.

## Background

This matter arises from able bodied seaman and crew member Edgar Townsend's fall on the steel deck of the Motor Tug Thomas, whereby he injured his right shoulder, rotator cuff, and possibly fractured his right clavicle. He seeks, *inter alia,* punitive damages and attorney's fees on the ground that AS & WM willfully and wantonly withheld from him maintenance and cure. AS & WM argues that punitive damages are no longer available to individuals in Mr. Townsend's position. Relying on a Fifth Circuit case, *Guevara v. Maritime Overseas Corp.,* AS & WM argues that punitive damages are unavailable under a Jones Act claim. *See Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496, 1512 (5th Cir. 1995) (en banc).

In 1987, the Eleventh Circuit held that "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case." *Hines v. J.A. LaPorte,* Inc. 820 F.2d 1187, 1109 (11th Cir. 1987). Proper cases include those where maintenance and cure has been arbitrarily and willfully withheld from a seaman. While noting that there is "no bright line to measure arbitrary conduct," examples of willfulness meriting punitive damages and attorneys fees

include: "(1) laxness in investigating a claim; (2) termination of benefits in response to the seaman's retention of counsel or refusal of a settlement offer; and (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically." *Id.* at 1190 (citation omitted).

Subsequent to *Hines*, the U.S. Supreme Court in 1990 ruled that the Jones Act, the Death on the High Seas Act (DOHSA), and general maritime law preclude recovery for non-pecuniary loss, thereby "restor[ing] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). AS & WM argues that courts have followed the Supreme Court's rationale in *Miles* and have refused to supplement the list of remedies afford by Congress to seamen. *See, e.g., Blige v. M/V GEECHEE GIRL,* 180 F.Supp.2d 1349, 1352 (S.D. Ga. 2001) ("Under the *Miles* uniformity principle, then, punitive damages are unavailable in maintenance and cure actions under general maritime law."); *Wininger v. Hendry Corp.*, No. 99-1184, 1999 WL 33218593, at *2 (M.D. Fla. Oct, 22, 1999) ("It is well-settled that punitive damages are unavailable in disputes concerning the payment of maintenance and cure."). Yet, in cases subsequent to *Miles*, the Eleventh Circuit has noted, albeit in *dicta,* the viability of *Hines* and the availability of punitive damages in exceptional cases. *See, e.g., In re Amtrak Sunset Ltd. Train Crash,* 121 F.3d 1421, 1429 (11th Cir. 1997) (punitive damages may be

available in "exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman"); *Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1127 (11th Cir. 1995) ("Carnival did not abrogate any established legal duty toward Flores, and therefore did not exhibit willful and wanton misconduct, which is the standard Flores must meet to recover punitive damages in admiralty law."); *Kasprik v. United States,* 87 F.3d 462, 464 (11th Cir. 1996) ("*Hines v. J.A. LaPorte, Inc.,* 820 F.2d 1187 (11th Cir. 1987) is the leading case in our circuit and is consistent with traditional admiralty law which provides the highest safeguards for a seaman's right to maintenance and cure.").

**Discussion**

The general rule is that interlocutory appeals, pursuant to 28 U.S.C. § 1292(b), are allowed when the following three requirements are satisfied: (1) a controlling question of law is involved; (2) the question is one where there is substantial ground for difference of opinion; and (3) an immediate appeal would materially advance the ultimate termination of the litigation.[1] *Accord McFarlin v. Conseco Services, LLC,* 381 F.3d 1251 (11th Cir. 2004).

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[1] In pertinent part, 28 U.S.C. § 1292(b), provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling

(Continued on following page)

Controlling Question of Law

Questions of law are distinguished from questions of fact and the Eleventh Circuit has elucidated: "What the framers of § 1292(b) had in mind is more of an abstract legal issue or what might be called one of 'pure' law, matters the court of appeals 'can decide quickly and cleanly without having to study the record.'" *McFarlin v. Conseco Services, LLC,* 381 F.3d 1251, 1258 (11th Cir. 2004) (quoting *Ahrenholz v. Board of Trustees of the University of Illinois,* 219 F.3d 674, 677 (7th Cir. 2000)); *see also Tucker v. Fearn,* 333 F.3d 1216 (11th Cir. 2003) (granting interlocutory appeal on whether a nondependent parent may recover loss of society damages for the wrongful death of his minor child under general maritime law). Moreover, "§1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond

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question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

the surface of the record in order to determine the facts." *McFarlin,* 381 F.3d at 1259. Furthermore, "[t]he legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law." *Id.*

Substantial Ground for Difference of Opinion

AS & WM has pointed to a split of authority with regard to the availability of punitive damages in a willful denial of maintenance and cure. *Compare Hines v. J.A. LaPorte, Inc.,* 820 F.2d 1187, 1189 (11th Cir. 1987) (holding punitive damages may be awarded for arbitrarily and willfully withholding maintenance and cure from a seaman); *GEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 702 (1st Cir. 1995) (affirming district court's determination that punitive damages are recoverable under plaintiff's general maritime claim; In the absence of any relevant legislation, we think that the uniformity principle enunciated in *Miles* is inapplicable. Therefore, plaintiffs are entitled to forms of relief traditionally available under the general maritime law, including punitive damages."), *with Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496, 1512 (5th Cir. 1995) (en banc) (holding punitive damages are not available in cases of willful nonpayment in any action for maintenance and cure under the general maritime law); *Glynn v. Roy Al Boat Mgmt. Corp.,* 57 F.3d 1495, 1512 (9th Cir. 1995) (finding punitive damages were not available for

willful failure to investigate seaman's claim for maintenance and cure, or to pay maintenance); *Miller v. Am. President Lines Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) (holding punitive damages are not recoverable under the Jones Act). This Court submits that the "substantial ground for difference of opinion" requirement has been satisfied.

Materially Advance the Ultimate Termination of the Litigation

The third statutory requirement "means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin,* 381 F.3d at 1259 (citation omitted). Evidence to support an award of punitive damages can be extensive. Whether this is an available remedy, may affect not only the length of discovery and the litigation, but also the complexity of the trial.[2] Accordingly, a resolution of this question would materially advance the ultimate termination of the litigation.

**Conclusion**

For the foregoing reasons, this Court **GRANTS** AS & WM's Motion, and pursuant to 28 U.S.C.

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[2] Financial and punitive damage related questions have been at issue in discovery related disputes in this case. At this time, discovery is still on-going. The parties have intimated that more such discovery disputes may be forthcoming.

§ 1292(b), certifies the following question for interlocutory appeal:

> Whether punitive damages may be legally awarded in a case where maintenance and cure has been arbitrarily and willfully withheld from a seaman.

This Court will **STAY** the current proceedings, pending the Court of Appeals' consideration of the interlocutory appeal.

**DONE AND ENTERED** at Jacksonville, Florida, this 24th day of April, 2006.

/s/ Harvey E. Schlesinger
**HARVEY E. SCHLESINGER**
**United States District Judge**

**Copies to:**

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Eleventh Circuit Court of Appeals

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

**ATLANTIC SOUNDINGS COMPANY, INC. et. al,**

Plaintiffs,

v.

**EDGAR TOWNSEND,**

Defendant.

**Case No. 2:05-cv-649-J-20HTS**

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**EDGAR TOWNSEND,**

Plaintiff,

v.

**WEEKS MARINE, INC.,**

Defendant.

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**Case No. 3:05-cv-653-J-20HTS**

## ORDER

(Filed Apr. 7, 2006)

Before the Court is Atlantic Soundings Co. Inc.'s and Weeks Marine Inc.'s ("AS & WM") Motion to Strike, Or, In the Alternative, Dismiss Edgar Townsend's Request for Punitive Damages (Doc. No. 30, filed March 16, 2006), to which Townsend responded (Doc. No. 38, filed March 31, 2006). Upon due consideration, AS & WM's Motion is **DENIED**.

Edgar Townsend seeks punitive damages on the grounds that AS & WM willfully and wantonly withheld from him maintenance and cure. On July 5,

2005, Townsend, an able bodied seaman and crew member of the Motor Tug Thomas, allegedly landed shoulder first on the steel deck of the Motor Tug Thomas, injuring his right shoulder, rotator cuff, and possibly fracturing his right clavicle. Townsend further alleges that on July 7, 2005, Weeks Marine advised him that it would not provide him with maintenance and cure. Townsend suggests that "Weeks Marine has a history of manufacturing pretexts for denying maintenance and cure" and that such denials are "arbitrary and capricious." Accordingly, Townsend seeks both attorneys fees and punitive damages. AS & WM suggest that punitive damages are no longer available to individuals in Mr. Townsend's position. Relying on a Fifth Circuit case, *Guevara v. Maritime Overseas Corp.*, AS & WM argue that punitive damages are unavailable under a Jones Act claim. *See Guevara v. Maritime Overseas*, 59 F.3d 1496, 1512 (5th Cir. 1995) (en banc).

In 1987, the Eleventh Circuit held that "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case." *Hines v. J.A. LaPorte,* Inc. 820 F.2d 1187, 1189 (11th Cir. 1987). Proper cases include those where maintenance and cure has been arbitrarily and willfully withheld from a seaman. While noting that there is "no bright line to measure arbitrary conduct," examples of willfulness meriting punitive damages and attorneys fees include: "(1) laxness in investigating a claim; (2) termination of benefits in response to the seaman's retention of counsel or refusal of a settlement offer,

and (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically." *Id.* at 1190 (citation omitted).

Subsequent to Hines, the U.S. Supreme Court in 1990 ruled that the Jones Act, the Death on the High Seas Act (DOHSA), and general maritime law preclude recovery for non-pecuniary loss, thereby "restor[ing] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). AS & WM argue that courts have followed the Supreme Court's rationale in *Miles* and have refused to supplement the list of remedies afford by Congress to seamen. *See, e.g., Blige v. M/V GEECHEE GIRL,* 180 F.Supp.2d 1349, 1352 (S.D.Ga. 2001) ("Under the *Miles* uniformity principle, then, punitive damages are unavailable in maintenance and cure actions under general maritime law."). However, this Court is not in the business of predicting whether "the Eleventh Circuit would follow *Guevara* when presented with the issue." *Id.* (citing *Hollinger v. Kirby Tankships, Inc.*, 910 F.Supp. 571 (S.D. Ala. 1996)).

Until the Eleventh Circuit overrules *Hines,* it is still the controlling precedence. In cases subsequent to *Miles* in 1990, the Eleventh Circuit has noted the viability of *Hines* and the availability of punitive damages in exceptional cases. *See, e.g., In re Amtrak Sunset Ltd. Train Crash,* 121 F.3d 1421, 1429 (11th Cir. 1997) (punitive damages maybe available in "exceptional circumstances such as willful failure to

furnish maintenance and cure to a seaman"); *Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1127 (11th Cir. 1995) ("Carnival did not abrogate any established legal duty toward Flores, and therefore did not exhibit willful and wanton misconduct, which is the standard Flores must meet to recover punitive damages in admiralty law."); *Kasprik v. United States,* 87 F.3d 462, 464 (11th Cir. 1996) ("*Hines v. J.A. LaPorte, Inc.,* 820 F.2d 1187 (11th Cir.1987) is the leading case in our circuit and is consistent with traditional admiralty law which provides the highest safeguards for a seaman's right to maintenance and cure.").

Moreover, the principle of stare decisis requires this Court to follow that law. *Scott v. Wainwright,* 617 F.2d 99, 104 (5th Cir. 1980).[1] In an analogous setting to the question before this Court, the Eleventh Circuit has recently instructed: "It is not given to us to overrule the decisions of the Supreme Court. We have stated repeatedly, and with respect to the very issue presented in this appeal, that 'we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.'" *Gibson,* 434 F.3d 1234, 1246-47 (11th Cir. 2006) (citations omitted). "This is so even if we are convinced that the Supreme Court will overturn its previous decision the next

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[1] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

time it addresses the issue. Though wounded, [the legal principle in question] still marches on and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it." *Id.* This reasoning and rationale applies with equal force to a district court with respect to binding case law from the Eleventh Circuit.

Accordingly, it is **ORDERED AND ADJUDGED**

Atlantic Soundings Co. Inc.'s and Weeks Marine Inc.'s Motion to Strike, Or, In the Alternative, Dismiss Edgar Townsend's Request for Punitive Damages is **DENIED**.

**DONE** AND **ENTERED** at Jacksonville, Florida, this 7th day of April, 2006.

/s/ Harvey E. Schlesinger
**HARVEY E. SCHLESINGER**
**United States District Judge**

**Copies to:**

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

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No. 06-13204-BB

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ATLANTIC SOUNDING CO., INC.,
WEEKS MARINE, INC.,

Plaintiffs-Counter-
Defendants-Appellants,

versus

EDGAR L. TOWNSEND,

Defendant-Counter-
Claimant-Appellee.

---

On Appeal from the United States District Court
for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 27, 2008)

Before: EDMONDSON, Chief Judge, CARNES and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service an the Court having

requested that the Court be polled on rehearing en Banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. Edmondson
CHIEF JUDGE

# OPPOSITION BRIEF

No. 08-214

FILED
SEP 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

ATLANTIC SOUNDINGS, INC.
and WEEKS MARINE, INC.,

*Petitioners,*

v.

EDGAR TOWNSEND,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether punitive damages may be legally awarded in a case where maintenance and cure has been arbitrarily and willfully withheld from a seaman.

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## INTRODUCTION

Edgar Townsend, a seaman, was an employee of Atlantic Soundings/Weeks Marine who was injured in the course of his employment.

## REASONS FOR GRANTING THE PETITION

### I. A CONFLICT EXISTS BETWEEN THE FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, NINTH AND ELEVENTH CIRCUITS ON THE QUESTION PRESENTED. THE MOST RECENT AND DIRECTLY CONFLICTING DECISIONS ARE THOSE OF THE FIFTH AND ELEVENTH CIRCUITS.

The decision of the Eleventh Circuit in *Atlantic Sounding Co. v. Townsend*[1] and the decision of the Fifth Circuit in *Guevara v. Maritime Overseas Corp.*[2] are in conflict. The Fifth Circuit holds that punitive damages may not be awarded for the wilful withholding of medical care, and the Eleventh Circuit holds that they may.

The position of the Ninth Circuit on the question presented differs somewhat from the positions of both the Fifth and Eleventh Circuits. The Ninth Circuit's position is that "punitive damages, in

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[1] *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007) (rehearing *en banc* denied).

[2] *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. Tex. 1995) (*en banc*), *cert. denied*, 516 U.S. 1046 (1996).

addition to attorney's fees, are . . . not needed to provide a powerful incentive for shipowners to investigate and pay promptly." *Glynn v. Roy Al Boat Management Company*.[3] Respectfully, the Ninth Circuit misjudges the human nature by concluding as a matter of law that all shipowners will be sufficiently motivated by the prospect of paying attorneys fees to properly provide injured seamen with medical care. Clearly some will not. Perhaps it can be attributed to the increase in medical costs from 1995, when *Glynn* was decided, to today, but there are published cases today which demonstrate that not all shipowners will be deterred by attorneys fees alone from withholding medical treatment from their seamen. If evidence of that trend is appearing in published opinions, those opinions represent the "tip of the iceberg." It is a growing trend.

The Second Circuit permits punitive damages, but measures the quantum of punitive damages by the amount of attorneys fees. In *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 415 (2d Cir. 1978) it said "both majority and minority opinions in *Atkinson* in essence found that punitive damages were awardable in maintenance and cure cases. . . . Yet the majority saw fit to go no further than to allow punitive damages limited to counsel fees."

The First Circuit, in an opinion from 1973, permits the award of punitive damages for wilful failure

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[3] *Glynn v. Roy Al Boat Management Company*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996).

to pay maintenance and cure. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1052 (1st Cir. 1973) (" . . . In view of the defendant's initial use of the venereal disease charge to justify withholding these payments, its refusal to pay past due unearned wages when notified that plaintiff was in danger of losing his home, and its termination of all payments after plaintiff refused to accept its settlement offer, the appropriateness of this instruction [on punitive damages] seems clear. . . .").

*Obiter dicta* in a Fourth Circuit decision states that " . . . courts have long awarded punitive damages to seamen where maintenance and cure benefits have been arbitrarily and willfully denied . . . " which indicates a willingness to award them in appropriate cases. *Manuel v. United States*, 50 F.3d 1253, 1258 (4th Cir. 1995).

The Sixth Circuit has not specifically ruled on punitive damages for wrongful failure to pay maintenance and cure. However, in *Miller v. American President Lines*, 989 F.2d 1450, 1458 (6th Cir. Ohio 1993) the Court found that punitive damages were not available to seamen in Jones Act or unseaworthiness cases. In *Huss v. King Co.*, 2000 U.S. Dist. LEXIS 13905 (W.D. Mich. Sept. 18, 2000) a district court extended that reasoning to maintenance and cure cases. Consequently while *obiter dicta* in the Sixth Circuit decision in *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585, 590 (6th Cir. 1989) shows no opposition to the award of punitive damages where the issue has been properly pled and subsequently proven

(" . . . The trial court properly rejected the seaman's charges of willfulness. . . . The conclusion of the trial court was not an abuse of discretion) the trend of Sixth Circuit authority seems to point toward the position that punitive damages cannot be awarded for wrongful failure to supply medical care to seamen in that district, which includes the upper Mississippi River and portions of the Great Lakes.

The decision of the Third Circuit in *Kopacz v. Del. River & Bay Auth.*, 248 Fed. Appx. 319 (3d Cir. 2007), was that "the majority of courts do not allow punitive damages for even arbitrary and willful refusal to pay maintenance and cure." However, the decision is not a precedential opinion under Third Circuit internal operating rules. The Supreme Courts of Alaska and Texas, in opinions published before the decision of the Eleventh Circuit in this case, followed the decision of the Fifth Circuit. See *Stone v. International Marine Carriers*, 918 P.2d 551, 556 (Alaska 1996) and *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996).

This issue has had adequate opportunity to percolate through the Circuit Courts and no uniform resolution of the issue has emerged.

## II. THE JONES ACT DOES NOT PREEMPT THE MARITIME COMMON LAW REMEDY OF MAINTENANCE AND CURE.

Maintenance and cure is a common law maritime remedy. It precedes the Jones Act by many centuries[4] and efforts to suggest that Congressional action

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[4] The concept of "maintenance and cure" can be traced back to ancient Greece and Persia. In 1154, Duchess Eleanor of Aquitaine, the mother of Richard the Lionhearted, went with her husband on the Second Crusade. At Ephesus, in Greece, she was introduced to maritime codes.

After the Second Crusade Eleanore returned to Aquitaine, a city-state in Southwest France whose major port was Bordeaux, and brought the Mediterranean maritime code with her. Since Eleanor lived on the Island of Oleron, just North of Bordeaux, her new maritime code became known as the *Rules of Oleron*. The Rules first codified in Europe a shipowner's obligation to provide maintenance and cure.

Article VI of the Rules provides that:

> [If] . . . any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship.

Article VII provides:

> If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him . . . hire a woman to attend him, and likewise to afford him such diet as is usual in the ship . . .

The requirement that the shipowner provide "a woman to attend him" has been replaced with the requirement that the shipowner provide the sick or injured seaman with hospitalization.

preempt maintenance and cure have been made since at least the 1820's.

In *Harden v. Gordon*, 11 F. Cas. 480, 484 (U.S. Court of Appeals 1823) Justice Story, whose compassion for seamen was legendary, while riding the Circuit, was confronted with a shipowner which argued that the passage of a statute by Congress requiring shipowners to provide for a medicine chest to be kept aboard ship preempted a seaman's right to maintenance and cure. Justice Story dismissed the argument as follows:

> . . . In the construction of statutes it is a general rule, that merely affirmative words do not vary the antecedent laws or rights of parties. There must be something inconsistent with or repugnant to them, to draw after a statute an implied repeal, either in whole or *pro tanto* of former laws; otherwise the statute is supposed to be merely declarative or cumulative. . . .

Using Justice Story's early formulation of the preemption doctrine in a maritime case, the Jones Act was meant by Congress to be a cumulative remedy, and not to supplant the common law remedy of maintenance and cure because the Jones Act is neither repugnant to the policies behind maintenance and cure, nor are they inconsistent. For over two centuries the doctrine of maintenance and cure has been judicially crafted and enforced with only

minor Congressional supplementation or interference.[5] Congress has demonstrated an intent "to leave well enough alone" and to permit the Courts to regulate the requirements of maintenance and cure.

The rationale for most of the modern decisions which depart from that principle, and disapprove the award of punitive damages for the wrongful denial of maintenance and cure, stem from a misinterpretation of *Miles v. Apex Marine*.[6] The Circuit Courts have either incorrectly assumed that exemplary damages were not historically available as a maritime remedy, a misconception which was cleared up in *Exxon Shipping v. Baker*,[7] or that if exemplary damages were historically available, that their use was preempted by the passage of the Jones Act in 1920.

This Court has counseled lower courts against using the Jones Act to narrow maritime remedies by analogy. In *American Export Lines v. Alvez*, 446 U.S. 274, 283-284 (U.S. 1980) the Court stated:

> ... the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime

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[5] The only reference to maintenance and cure in the United States Code is found in 46 U.S.C. §688(b). That section limits the right of aliens injured in the offshore oil drilling industry or in foreign territorial waters to seek redress in U.S. courts.

[6] *Miles v. Apex Marine*, 498 U.S. 19 (1990).

[7] *Exxon Shipping v. Baker*, 128 S.Ct. 2605 (2008).

> law. . . . Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts. And we have already indicated that "no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.

Maintenance and cure is a non-statutory federal remedy which is appropriate to effectuate the policies of the general maritime law.

For the decade between the *American Export* case and *Miles*, lower courts exercised the restraint with this Court counseled. However, since this Court's decision in *Miles*, lower courts have permitted the guidance provided by *American Export* to go ignored. The limitations on non-pecuniary[8] damages in maritime wrongful death cases occurring on the high seas to seamen have now "jumped the rails" to include cases involving injuries to non-seamen such as cruise ship passengers and recreational boaters, and to include accidents happening on territorial waters, as

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[8] ". . . Among the impediments to such discussions [concerning punitive damages in maritime law] have the courts' evident misunderstanding of the history of maritime punitive damages and the temptation to stop thinking once someone points out that punitive damages are 'nonpecuniary.'" David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 164 (1997).

opposed to the high seas. These are areas in which Congress demonstrated no intent to regulate by passage of either the Jones Act or the Death on the High Seas Act.[9]

Similarly, Congress has shown no intent to regulate maintenance and cure and hence the Jones Act does not preempt general maritime law remedies.

## III. THE LONGSHORE AND HARBOR WORKERS COMPENSATION ACT IS CLOSELY ANALOGOUS TO MAINTENANCE AND CURE AND PROVIDES EVIDENCE OF CONGRESS' INTENT WITH REGARD TO EMPLOYERS WHO ARBITRARILY OR WILFULLY WITHHOLD MEDICAL CARE FROM INJURED EMPLOYEES.

Maintenance and cure is the historical predecessor to modern workers' compensation – a system of liability without fault, requiring employers to provide medical care and a living wage to employees who are injured on the job. For that reason, the analogous statute which provides the Courts with guidance in determining the bounds of general maritime law is the Longshore and Harbor Workers Compensation and not the Death on the High Seas Act or the Jones

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[9] According to one noted commentator "In this vein, some courts have taken upon themselves the agenda of tort reform despite the fact that Congress itself has not seen fit to do so." Robert Force, *The Legacy of Miles v. Apex Marine Corporation*, 30 Tul. Mar. L. J. 35, 36 (2006).

Act. Most commentators have suggested that there is nothing in the Jones Act which creates a reason to deny seaman remedies which are analogous to remedies typically available to land-based workers.[10, 11]

Atlantic Soundings and Weeks Marine employ seamen and non-seamen maritime workers who work together, sometimes side by side, on dredging projects. Were a seaman and a non-seaman maritime worker to be injured by, for example, a falling crane while working shoulder to shoulder, and were they to suffer an identical injury, and were their employer to fail or refuse to provide medical care, their situations would be substantially different.

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[10] As Professor Robertson from the University of Texas pointed out "no one has suggested a justification in policy or principle for treating seamen worse than other maritime plaintiffs. Nor has anyone argued that it makes sense for the maritime law to be more restrictive of punitive liability than the prevailing land-based law." David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 164 (1997).

[11] As Professor Force from Tulane University has stated "the Jones Act and DOHSA are remedial legislation and quite progressive when one considers that they were both enacted in 1920. In both statutes, Congress created remedies that had been previously unavailable. Is there any reason to believe that Congress, in enacting these statutes, intended to circumscribe the entire law of maritime personal injury recovery, or that Congress intended to deny remedies that are now routinely available in land-based tort situations?" Robert Force, *The Legacy of Miles v. Apex Marine Corporation*, 30 Tul. Mar. L. J. 35, 45 (2006).

If the corporation failed to provide medical care for the maritime worker, or otherwise fail to "secure compensation" or took action "with the intent to avoid the payment of compensation," the corporation could be charged with a crime. The President, Secretary, and Treasurer of the corporation could be "severally liable to such penalty of imprisonment [for up to one year] as well as jointly liable with such corporation for such fine."[12] Not only could criminal penalties be imposed, but the maritime worker would have a civil remedy akin to strict liability. The worker would be entitled to bring an action at law, or in admiralty, for the full amount of his losses, without any limitation to the benefits provided under the Longshore Act.[13] Further, the employer would be stripped of the defenses of comparative negligence[14] and assumption of risk.

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[12] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §938.

[13] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(a).

[14] Section 905(a) says that it prevents the employer from pleading "contributory negligence." However, since the doctrine of contributory negligence was replaced by the doctrine of comparative negligence in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) the most logical interpretation of the Act is to bar the defense of comparative negligence. *Smallwood v. American Trading and Transport*, 839 F.Supp. 1377 (N.D. Cal. 1993) (" . . . [The House] Committee indicated that comparative rather than contributory negligence should apply and the assumption of risk doctrine, which is foreign to admiralty negligence, would not obtain . . . ").

On the other hand, under those Circuits, such as the Fifth, which prohibit the seaman from seeking punitive damages, the employer would suffer no penalty for withholding medical treatment from the seaman. It might have to pay the attorneys fees of the seaman, and some employers might find that incentive enough to not withhold medical care. However, there are "bad actors" among maritime employers, particularly in times when medical care is expensive. Some of those employers might seek to use the denial of treatment as a means to compel settlements of cases. Some might even develop the withholding of medical care into a corporate policy to keep workers in check, instill fear in employees, and keep them from seeking legal assistance.

The policy set out by Congress in the Longshore Act is clear. Maritime employers are to be punished if they fail to provide their workers with medical care so that they can get well and return to the work force. While the coverage of the Longshore Act does not extend to seamen, the intent of Congress should direct the actions of the Courts.

While the Court lacks the inherent ability to impose criminal sanctions in the absence of a statute, it does have inherent power to impose civil penalties which can create the desired effect. *Exxon Shipping v. Baker*. When employers of seamen fail to provide those seamen with medical care, it can use its admiralty powers to provide for the award of exemplary damages sufficient enough to deter "bad actors" from

intentionally causing injuries to their employees by refusing them medical care.

## IV. THE CONFLICT BETWEEN THE CIRCUITS, AND THE ELEVENTH CIRCUIT DECISION IN THIS CASE, HAS CAUSED MARITIME EMPLOYERS TO INCORPORATE FORUM SELECTION CLAUSES IN THEIR CONTRACTS WITH SEAMEN.

There is urgency to the Court's resolution of this issue. First, unlike some issues which come before the Court, this issue involves real seaman suffering real physical pain and increased disability because they can't get needed surgery or other medical treatment. Certainly some seamen qualify for Social Security disability and receive Medicaid treatment, so the employer's responsibility falls upon the taxpayer. But in many cases, the seamen receive no treatment, self medicate with large doses of non-prescription pain relievers and are unable to return to work. They can end up sleeping in their cars, or homeless.

Anecdotal evidence from attorneys in the Fifth Circuit suggests that qualified maritime attorneys are unwilling to take on maintenance and cure cases on a contingent hourly fee paid at the conclusion of time-consuming and expensive litigation. Maintenance and cure cases require expert testimony. The federal cost statute does not permit the recovery of expert witness fees, so an attorney who takes on a maintenance and cure case will be required to hire expensive medical experts, pay for them out of the

attorney's pocket, with the uncomfortable assurance that win or lose, the attorney will not be compensated for hiring those experts. Unless a seaman's maintenance and cure claim is coupled with a significant personal injury for which there may be recovery under the Jones Acts, securing legal representation is difficult in that Circuit.

Since the decision of the Eleventh Circuit in this case a number of maritime employers have begun to include in their contracts with seamen forum selection clauses where the chosen forum is a federal court located outside of Florida, Alabama, or Georgia. These forum selection clauses may be included in the initial hiring contract, or may be part of a post-injury agreement, known as a wage continuation agreement, in which a seaman agrees to waive local jurisdiction in exchange for the continuation of his wages, which are later deducted from his Jones Act recovery. Wage continuation agreements are little more than loans or advances on a future settlement.

While seamen generally sign their employment contracts without consulting a lawyer, and frequently without reading them, they are unaware of the effect that agreeing to resolve their personal injury claims in New Orleans, rather than in Miami, may have on their ability to secure maintenance and cure.

Without resolution of the conflict between the Circuits, overreaching by employers will result in forum shopping and inconsistent results in maintenance and cure litigation.

## V. THE REASONING IN *EXXON SHIPPING*, WHICH APPLIED MARITIME COMMON LAW PRINCIPLES TO PUNITIVE DAMAGES FOR MARITIME POLLUTION CLAIMS, CAN ONLY BE EXTENDED TO MARITIME PERSONAL INJURY CLAIMS BY THIS COURT.

In *Exxon Shipping v. Baker* the Court indicated that with regard to remedies for common law maritime causes of action for pollution, "responsibility lies with this Court as a source of judge-made law in the absence of statute." In this case the Court would be "... acting here in the position of a common law court of last review, faced with a perceived defect in a common law remedy. . . ." regarding maritime personal injuries.

Most Circuits have taken a position on this issue, and two Circuits, the Fifth and the Eleventh, have considered or declined to consider the issue *en banc*. The Fifth Circuit issued an opinion *en banc* in *Guevera*. While the refusal to reconsider a panel decision *en banc* is usually accorded little significance, the Eleventh Circuit's decision not to reconsider in this case may be different. It should be analyzed in light of the fact that the Eleventh Circuit panel decision relied upon Fifth Circuit law which pre-existed the founding of the Eleventh Circuit, yet held directly the opposite to the Firth Circuit's decision which had overruled the earlier decision on which it was based.

## CONCLUSION

Under the prior panel precedent rule, it is unlikely that the Circuits will now harmonize this law among themselves. Until this Court reconsiders the question, the law will remain in conflict.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 08-214

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# In The Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

v.

EDGAR L. TOWNSEND,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICI CURIAE* THE AMERICAN WATERWAYS OPERATORS, THE CHAMBER OF SHIPPING OF AMERICA, AND THE DREDGING CONTRACTORS OF AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The American Waterways Operators, together with the Chamber of Shipping of America and the Dredging Contractors of America, submits this brief as *amicus curiae* in support of the position of Petitioners Atlantic Sounding Co., Inc. and Weeks Marine, Inc., with the written consent of all parties pursuant to Sup. Ct. R. 37.2(a).[1]

## INTEREST OF *AMICI CURIAE*

The American Waterways Operators (AWO) is the national trade association for the nation's inland and coastal tugboat, towboat, and barge industry. The industry employs more than 30,000 American seamen and owns and operates nearly 4,000 tugboats and towboats and more than 27,000 barges throughout the country. AWO represents the largest segment of the U.S.-flag domestic fleet. Its 350 member companies carry more than 800 million tons of domestic cargo every year. They operate their vessels on the nation's inland rivers, on the Atlantic, Pacific, and

[1] In accordance with Sup. Ct. R. 37.2(a), *amici curiae* the American Waterways Operators (AWO), the Chamber of Shipping of America (CSA), and the Dredging Contractors of America (DCA) timely notified the parties of their intent to file a brief in support of Petitioners, and letters of consent to the filing of this *amicus* brief have been filed with the Clerk of the Court. Pursuant to Sup. Ct. R. 37.6, counsel for AWO, CSA, and DCA states that it authored this brief in its entirety and that no other person or entity other than AWO, CSA, and DCA provided monetary support for the preparation or submission of this brief.

Gulf coasts, on the Great Lakes, and in ports and harbors around the country.

For over 60 years, AWO has worked to promote a better understanding of the domestic waterborne transportation industry and its safe and environmentally sound contribution to the U.S. economy. To that end, AWO acts as the towing industry's principal advocate with policymakers and federal officials in Washington D.C. In 1995, AWO and the Coast Guard entered into a written agreement establishing the Coast Guard-AWO Safety Partnership, illustrating their shared commitment to ensuring the safety of U.S. waters, vessels, and crews. AWO continues to demonstrate that commitment today as it works closely with the Coast Guard to create and implement a towing vessel inspection program pursuant to the Coast Guard and Maritime Transportation Act of 2004.

AWO is joined in this *amicus* brief by the Chamber of Shipping of America (CSA) and the Dredging Contractors of America (DCA). CSA represents 31 U.S.-based companies that own, operate, or charter oceangoing vessels, including container ships, tankers, chemical ships, dry bulk vessels, integrated tug and barge units and other merchant vessels engaged in both the domestic and international trades, or that maintain a commercial interest in the operation of such oceangoing vessels. CSA's member companies and the international trade associations with which they are affiliated represent 75% of all oceangoing vessels calling in U.S. ports. Their ships call at ports

on every coast of the United States. CSA promotes sound public policy through legislative and regulatory initiatives that include marine safety, maritime security, and environmentally protective operating principles. CSA sits on the U.S. delegation to the International Maritime Organization in London, and is the U.S. shipowner representative to the International Labor Organization.

The DCA is the national trade association for the dredging industry. DCA works to improve the quality and responsiveness of dredging service delivery to the nation, ensuring that America's ports, waterways, wetlands and beaches are efficiently constructed and maintained in an environmentally sustainable manner. DCA has represented the interests of the U.S. dredging industry and its members for over twenty-six years. The present membership includes nine large dredging companies, eleven small companies, and five associate members. Its members operate on the Atlantic, Gulf, and Pacific coasts, the Great Lakes, the inland rivers, and in Hawaii and Alaska. DCA represents the dredging industry on key issues before Congress and is an active partner to the U.S. Army Corps of Engineers, public port authorities, and state and local governments.

The members of AWO, CSA, and DCA rely upon the predictability and uniformity of federal maritime law to properly assess and protect against the risks inherent in the maritime industry. They enter contracts, hire employees, buy insurance, and make countless other decisions based upon uniform principles of

federal maritime law. If the rules change from circuit to circuit, they cannot make informed business decisions. As this Court noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), federal maritime law is now largely circumscribed by statute, and members of the maritime industry need to be able to rely upon the boundaries imposed by federal maritime legislation. AWO, CSA, and DCA therefore support Petitioners' request for review of the Eleventh Circuit decision in *Atlantic Sounding Co. v. Townsend,* 496 F.3d 1282 (11th Cir. 2007) in order to resolve the conflict caused by the failure of the First, Fourth, Sixth, and Eleventh Circuit Courts of Appeal to follow this Court's direction in *Miles* and preclude awards of punitive damages in maintenance and cure claims.

## SUMMARY OF THE ARGUMENT

This Court should grant certiorari because a stark conflict exists between the circuit courts. Consistent with the Court's decision in *Miles*, the Second, Third, Fifth, and Ninth Circuits have held that a seaman cannot recover punitive damages in maintenance and cure cases. *See Kraljic v. Berman Enter., Inc.*, 575 F.2d 412 (2d Cir. 1978), *Kopacz v. Delaware River and Bay Auth.*, 248 Fed. App'x 319 (3d Cir. 2007), *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), and *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995). In contrast, the First, Fourth, Sixth, and Eleventh Circuits have

allowed seamen to recover punitive damages in maintenance and cure cases. *See Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051 (1st Cir. 1973), *Manuel v. United States*, 50 F.3d 1253, 1260 n.6 (4th Cir. 1995), *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585, 590 n.8 (6th Cir. 1989), and *Townsend*, 496 F.3d at 1286. This Court should accept review of the Eleventh Circuit decision in *Townsend* to resolve the conflict.

This Court should also accept review of this case to restore uniformity to the federal maritime law governing seamen's injury claims. In *Miles*, this Court recognized the intent of Congress to make federal maritime law uniform and predictable. *Miles*, 498 U.S. at 26-27. *Miles* further acknowledged the constitutional principle that if federal statutes dominate an area of law, judges "are not free to expand remedies at will simply because it might work to the benefit of seamen . . . " *Miles*, 498 U.S. at 36. By extending punitive damages to seamen in maintenance and cure cases, *Townsend* conflicts with the principles of uniformity and separation of powers. This Court should therefore grant certiorari to realign the case law with *Miles*.

The Eleventh Circuit itself has all but asked this Court to explicitly overrule pre-*Miles* precedent. *Townsend* conflicts not only with this Court's reasoning in *Miles*, but also with the Third, Fifth, and Ninth Circuits, all of which have followed *Miles* to preclude punitive damages in maintenance and cure claims. *See Kopacz*, 248 Fed. App'x at 323, *Guevara*, 59 F.3d at 1513, and *Glynn*, 57 F.3d at 1505. And yet,

*Townsend* offers no rationale for the decision to allow punitive damages; the Eleventh Circuit merely believes it is bound by pre-*Miles* precedent that has been subsequently overruled by the Fifth Circuit. This Court should therefore issue an opinion putting discredited pre-*Miles* precedent to rest.

## ARGUMENT

### I. This Court Should Accept Certiorari to Resolve the Conflict Between the Circuits and Restore Uniformity to Maritime Law.

In *Miles*, this Court made clear that non-pecuniary damages are unavailable to seamen making claims under the Jones Act, the Death on the High Seas Act (DOHSA), or general maritime law. *Miles*, 498 U.S. at 37. Following this Court's lead in *Miles*, the Third, Fifth, and Ninth Circuits all ruled that a seaman asserting a claim for maintenance and cure could not recover punitive damages. *See Kopacz*, 248 Fed. App'x at 323; *Guevara*, 59 F.3d at 1513 (overruling *Holmes v. J. Ray McDermott & Co*, 734 F.2d 1110 (5th Cir. 1984)); *Glynn*, 57 F.3d at 1505; *see also Kraljic*, 575 F.2d at 416 (pre-*Miles* case reversing district court decision to allow punitive damages). The Eleventh Circuit and the Fourth Circuit, however, refused to abandon pre-*Miles* precedent and allowed injured seamen to claim punitive damages in suits for maintenance and cure. *See Townsend*, 496 F.3d at 1286; *Manuel*, 50 F.3d at 1260 (citing *Holmes*,

734 F.2d at 1118 and *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051-52 (1st Cir. 1973)).

The conflict is rooted in the reference to "exemplary damages" in the ***dissent*** to *Vaughan v. Atkinson*, 369 U.S. 527 (1962). Based on that dissent, the First Circuit, in 1973, became the first to allow a seaman to recover punitive damages in a maintenance and cure case. *See Robinson*, 477 F.2d at 1051. *Robinson*, however, improperly relied on the dissent in *Vaughan*. *See Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) ("[A] dissenting Supreme Court opinion is not binding precedent."). Like *Miles*, the decision of the Court in *Vaughan* never extended non-pecuniary remedies to seamen. *Robinson* mistakenly did so and thus generated the conflict that is now before this Court.

For the most part, maintenance and cure decisions contrary to *Miles's* prohibition on non-pecuniary damages either pre-date *Miles* or trace their reasoning to *Robinson* and the dissent in *Vaughan*. *See, e.g.*, *Holmes*, 734 F.2d at 1118 (pre-*Miles* case citing *Vaughan* and *Robinson*); *Hines v. J.A. Laporte, Inc.*, 820 F.2d 1187, 1188 (11th Cir. 1987) (pre-*Miles* case citing *Vaughan, Robinson,* and *Holmes*); *Al-Zawkari*, 871 F.2d at 590 n.8 (pre-*Miles* case citing *Holmes*); *Manuel*, 50 F.3d at 1260 n.6 (post-*Miles* case citing *Holmes* and *Robinson*). These decisions need to be brought in line with *Miles*. This Court should grant certiorari to resolve the clear circuit conflict and confirm the maritime rule prohibiting punitive damages in maintenance and cure claims.

## II. *Miles* Reaffirmed the Congressional Mandate for Uniformity and Predictability in Maritime Law.

Congress intended that "federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27. In accordance with the "constitutionally based principle," maritime law is "a conceptual body whose cardinal mark is uniformity." *Miles*, 498 U.S. at 27; *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983). Maritime courts have also acknowledged that "the need for predictability in the commercial maritime arena is arguably greater than in other areas of law and commerce." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137 (5th Cir. 1995). This uniformity, "with [its] companion quality of predictability, [is] a prized value in the extensive underwriting of marine risks, [and is] best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit." *Lewis*, 716 F.2d at 1428. As the Fifth Circuit noted in *Coats*,

> It is axiomatic that when the rules of law are clear, parties may contract within or around their boundaries, and the commercial system is facilitated in many ways, including reduced litigation, more favorable insurance coverage, and overall ease of application.

*Coats*, 61 F.3d at 1137.

After extensive analysis of congressional intent, *Miles* held that because non-pecuniary damages are

not available under DOHSA or the Jones Act, the uniformity principle dictates that such damages are likewise unavailable in seamen's claims under general maritime law. *Miles*, 498 U.S. at 32-33. It therefore follows that punitive damages are unavailable in a seaman's claim for maintenance and cure. The Eleventh Circuit's contrary decision in *Townsend* thus contradicts the congressional and judicial mandate of uniformity. As Congress and this Court recognize, such inconsistency does not serve the interests of seamen, vessel operators, or the courts that must decide their disputes.

## III. The Eleventh Circuit Decision Violates the Constitutional Principle of Separation of Powers.

"Cognizant of the constitutional relationship between the courts and Congress," *Miles* reiterated that federal courts "are not free to expand remedies at will" in maritime cases where Congress has spoken. *Miles*, 498 U.S. 37, 36. *Miles* was explicit that the Jones Act "limits recovery to pecuniary loss," noting that "[i]ncorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Id.* at 32. Based on the uniformity principle, *Miles* reasoned that a plaintiff was therefore precluded from seeking non-pecuniary damages in a seaman's injury or death claim under general maritime law since such damages went beyond those provided by Congress under the Jones Act. *Miles*, 498 U.S. at 36-37.

The Eleventh Circuit attempted to distinguish *Miles* because it involved death, as opposed to injury, of a seaman. *See, e.g., Townsend*, 496 F.3d at 1286. The Court's opinion in *Miles*, however, was based upon the Jones Act, and it specifically mentioned the statutory scheme for seamen's injury and death claims. Citing separation of powers concerns, the Court refused to create remedies that go "well beyond the limits of Congress' ordered system of recovery for seamen's ***injury*** and death." *Miles*, 498 U.S. at 36 (emphasis added). *Miles* recognized that to preclude non-pecuniary damages under the Jones Act and allow them under general maritime law contradicts the constitutional principle of uniformity: "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action . . . than Congress has allowed . . . " *Miles*, 498 U.S. at 32. For the same reason, it would be inconsistent to allow non-pecuniary damages in a seaman's maintenance and cure claim, which is similarly a judicially created cause of action, when such damages are not allowed in seamen's injury claims under the Jones Act. As the Court stated in *Miles*:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where

> doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

*Miles*, 498 U.S. at 27. This Court should grant certiorari to confirm the principle set forth in *Miles*: that the courts are not free to expand the remedies provided by Congress in the Jones Act by allowing the imposition of non-pecuniary damages in a seaman's injury claim under general maritime law.

## IV. The Eleventh Circuit Has Essentially Asked This Court to Bury *Hines* and *Holmes* So That It May Follow the Reasoning in *Miles*.

The Eleventh Circuit all but concedes that its decision in this case is based on case law this Court should overrule: *Hines v. J.A. Laporte, Inc.*, 820 F.2d 1187 (11th Cir. 1987). The Eleventh Circuit acknowledges that *Miles* forecloses non-pecuniary damages in a wrongful death action under DOHSA, the Jones Act, and general maritime law. *Townsend*, 496 F.3d at 1285. It refuses, however, to connect the dots and find punitive damages foreclosed for a maintenance and cure claim. The Eleventh Circuit offers no rationale to

contradict the reasoning in *Miles*. Instead, it relies on this Court's silence to justify the discredited reasoning in *Hines* as the basis for its decision. "[Petitioner's] argument can only be based on the reasoning of the *Miles* opinion, not on the *Miles* decision: its holding. *Miles* says and – more important – decides nothing about maintenance and cure actions or punitive damages." *Townsend*, 496 F.3d at 1286.

The Eleventh Circuit makes clear, however, that the *Hines* reasoning underlying its current decision no longer holds water. In *Hines*, "[w]e decided to follow the Fifth Circuit in adopting the reasoning of *Merry Shipping*." *Townsend*, 496 F.3d at 1285 (citing *Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. 1981)). As the Fifth Circuit has pointed out, however, "*Hines*'s reliance on *Merry Shipping* is now analytically problematic because, as explained, *Merry Shipping* was effectively overruled by the later decision in *Miles*." *Guevara*, 59 F.3d at 1509.

The Fifth Circuit similarly eliminated *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984), upon which *Townsend* also relies (*see Townsend*, 496 F. 3d at 1285): "Our *Holmes* precedent for the availability of punitive damages in maintenance and cure cases is no longer well-founded. In particular, the advent of *Miles* brings about significant changes in the admiralty that we cannot ignore." *Guevara*, 59 F.3d at 1513. The *Guevara* court went on to say, "when we couple the weakened foundation of *Holmes* with our understanding of the *Miles*

uniformity principle, we are persuaded that punitive damages should no longer be available in cases of willful nonpayment of maintenance and cure under the general maritime law. To this extent, therefore, *Holmes* is overruled." The Eleventh Circuit, not to mention the Fourth and Sixth Circuits, which also rely upon *Holmes*, needs to hear from this Court that *Hines* and *Holmes* are overruled.

The District Court in this case made the same tacit request. Like the Eleventh Circuit, the District Court's Order made no argument against *Miles*, stating only: "we are not at liberty to disregard binding case law [i.e. *Hines*] that . . . has been only weakened, rather than directly overruled, by the Supreme Court. . . . This is so even if we are convinced that the Supreme Court will overturn its previous decision the next time it addresses the issue. Though wounded, the legal principle in question still marches on and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it." *Atlantic Soundings, Inc. v. Townsend*, No. 3:05-cv-649-J-20HTS at 4 (M.D. Fla. April 7, 2006) (citing *U.S. v. Gibson*, 434 F.3d 1234, 1246-47 (11th Cir. 2006)). The First, Fourth, Sixth, and Eleventh Circuits will not, of their own accord, join the procession led by the Second, Third, Fifth, and Ninth Circuits until directed by this Court. It is therefore time for this Court to bury *Hines* and *Holmes*.

## CONCLUSION

For the reasons set forth above, AWO, CSA, and DCA respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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September 16, 2008

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

**ATLANTIC SOUNDINGS COMPANY, INC. et. al,**

Plaintiffs,

**v.**

**EDGAR TOWNSEND,**

Defendant.

**Case No.3:05-cv-649-J-20HTS**

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**EDGAR TOWNSEND,**

Plaintiff,

**v.**

**WEEKS MARINE, INC.,**

Defendant.

/

**Case No.3:05-cv-653-J-20HTS**

(Filed Apr. 7, 2006)

**ORDER**

Before the Court is Atlantic Soundings Co. Inc.'s and Weeks Marine Inc.'s ("AS & WM") Motion to Strike, Or, In the Alternative, Dismiss Edgar Townsend's Request for Punitive Damages (Doc. No. 30, filed March 16, 2006), to which Townsend responded (Doc. No. 38, filed March 31, 2006). Upon due consideration, AS & WM's Motion is **DENIED**.

Edgar Townsend seeks punitive damages on the grounds that AS & WM willfully and wantonly withheld from him maintenance and cure. On July 5,

2005, Townsend, an able bodied seaman and crew member of the Motor Tug Thomas, allegedly landed shoulder first on the steel deck of the Motor Tug Thomas, injuring his right shoulder, rotator cuff, and possibly fracturing his right clavicle. Townsend further alleges that on July 7, 2005, Weeks Marine advised him that it would not provide him with maintenance and cure. Townsend suggests that "Weeks Marine has a history of manufacturing pretexts for denying maintenance and cure" and that such denials are "arbitrary and capricious." Accordingly, Townsend seeks both attorneys fees and punitive damages. AS & WM suggest that punitive damages are no longer available to individuals in Mr. Townsend's position. Relying on a Fifth Circuit case, *Guevara v. Maritime Overseas Corp.*, AS & WM argue that punitive damages are unavailable under a Jones Act claim. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1512 (5th Cir. 1995) (en banc).

In 1987, the Eleventh Circuit held that "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case." *Hines v. J.A. LaPorte*, Inc. 820 F.2d 1187, 1189 (11th Cir. 1987). Proper cases include those where maintenance and cure has been arbitrarily and willfully withheld from a seaman. While noting that there is "no bright line to measure arbitrary conduct," examples of willfulness meriting punitive damages and attorneys fees include: "(1) laxness in investigating a claim; (2) termination of benefits in response to the seaman's retention of counsel or refusal of a settlement offer;

and (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically." *Id.* at 1190 (citation omitted).

Subsequent to *Hines*, the U.S. Supreme Court in 1990 ruled that the Jones Act, the Death on the High Seas Act (DOHSA), and general maritime law preclude recovery for non-pecuniary loss, thereby "restor[ing] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). AS & WM argue that courts have followed the Supreme Court's rationale in *Miles* and have refused to supplement the list of remedies afford by Congress to seamen. *See, e.g., Blige v. M/V GEECHEE GIRL*, 180 F.Supp.2d 1349, 1352 (S.D.Ga. 2001) ("Under the *Miles* uniformity principle, then, punitive damages are unavailable in maintenance and cure actions under general maritime law."). However, this Court is not in the business of predicting whether "the Eleventh Circuit would follow *Guevara* when presented with the issue." *Id.* (citing *Hollinger v. Kirby Tankships, Inc.*, 910 F.Supp. 571 (S.D. Ala. 1996)).

Until the Eleventh Circuit overrules *Hines*, it is still the controlling precedence. In cases subsequent to *Miles* in 1990, the Eleventh Circuit has noted the viability of *Hines* and the availability of punitive damages in exceptional cases. *See, e.g., In re Amtrak Sunset Ltd. Train Crash*, 121 F.3d 1421, 1429 (11th Cir. 1997) (punitive damages may be available in "exceptional circumstances such as willful failure to

furnish maintenance and cure to a seaman"); *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) ("Carnival did not abrogate any established legal duty toward Flores, and therefore did not exhibit willful and wanton misconduct, which is the standard Flores must meet to recover punitive damages in admiralty law."); *Kasprik v. United States*, 87 F.3d 462, 464 (11th Cir. 1996) ("*Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir.1987) is the leading case in our circuit and is consistent with traditional admiralty law which provides the highest safeguards for a seaman's right to maintenance and cure.").

Moreover, the principle of stare decisis requires this Court to follow that law. *Scott v. Wainwright*, 617 F.2d 99, 104 (5th Cir. 1980).[1] In an analogous setting to the question before this Court, the Eleventh Circuit has recently instructed: "It is not given to us to overrule the decisions of the Supreme Court. We have stated repeatedly, and with respect to the very issue presented in this appeal, that 'we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.'" *U.S. v. Gibson*, 434 F.3d 1234, 1246-47 (11th Cir. 2006) (citations omitted). "This is so even if we are convinced that the Supreme Court will overturn its

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

previous decision the next time it addresses the issue. Though wounded, [the legal principle in question] still marches on and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it." *Id.* This reasoning and rationale applies with equal force to a district court with respect to binding case law from the Eleventh Circuit.

Accordingly, it is **ORDERED AND ADJUDGED**

Atlantic Soundings Co. Inc.'s and Weeks Marine Inc.'s Motion to Strike, Or, In the Alternative, Dismiss Edgar Townsend's Request for Punitive Damages is **DENIED**.

**DONE AND ENTERED** at Jacksonville, Florida, this 7th day of April, 2006.

/s/ Harvey E. Schlesinger
**HARVEY E. SCHLESINGER**
**United States District Judge**

**Copies to:**

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# AMICUS CURIAE BRIEF

No. 08-214

Supreme Court, U.S.
FILED
SEP 19 2008
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In The
# Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

vs.

EDGAR L. TOWNSEND,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* CRUISE LINES INTERNATIONAL ASSOCIATION IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

The Cruise Lines International Association ("CLIA"), based in Fort Lauderdale, Florida with a satellite office in Washington D.C., is the world's largest cruise line non-profit trade association. CLIA's 24 cruise line members represent 97 percent of the cruise capacity operating in North America. CLIA's Executive Partners include over 80 strategic business allies, providing a wide array of services to the cruise industry. In addition, CLIA has nearly 16,000 travel agent professionals as members.

CLIA's member lines operate over 150 ships, the largest of which carries over 1,200 crewmembers. In fact, the cruise industry is the largest employer of maritime workers of any industry operating in the U.S. CLIA's members in 2007 collectively employed over 140,000 crewmembers, a number that continues to grow each year.

CLIA exists, in part, to promote all measures that foster a safe, secure, and healthy cruise experience for both passengers and crew. Ensuring the

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[1] The parties' letters of consent for the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.2, counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members or its counsel has made a monetary contribution to this brief, preparation, or submission.

health and safety of crewmembers is of utmost importance because vessel operations worldwide are dependent on the valuable services provided by many skilled employees recruited worldwide. When crewmembers are injured or become ill while in service, CLIA's cruise line members are committed to promptly providing any and all benefits dictated by the circumstances, the relevant contractual obligations (such as those contained in collective bargaining agreements), and applicable law.

Despite the cruise lines' best efforts at promoting the health and safety of its crewmembers, injuries, illnesses, and disabilities are unfortunately inevitable. The approximately 140,000 crewmembers employed by CLIA's cruise line members hail from all over the world[2] and are employed in countless capacities, from entertainers to engine room oilers. The diversity of the workforce alone presents myriad circumstances in which potential payment of maintenance and cure, or some other form of benefits or remuneration dictated by foreign law, is triggered.

Many of the situations involve foreign crew with union contracts or government-mandated systems to which all shipowners hiring crew from those nations must adhere. Their prescribed remedies are often different than maintenance (a daily living allowance), cure (payment of "curative" medical bills),

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[2] Over 90% of the crewmembers employed by CLIA's member lines are foreign seamen.

and unearned wages applicable under U.S. law. In some nations, such as the U.K., there is no such concept as maintenance or cure. In many nations socialized medical benefits and wages for a specified period after incapacity is the norm. Other countries have a system of "sick wages" which continues the contractual wages while the crewman is recuperating, up to a maximum period. The remedies applicable abroad sometimes result in the crewman receiving greater benefits in sick wages than total benefits payable under U.S. law.

An employer's analysis of what benefits to pay each crewman in the cruise industry is often complicated by these various factors, as well as those at play in any traditional benefits analysis. Maintenance and cure are forfeited if the medical need arose from willful misconduct.[3] It can be waived if a prior material medical fact was undisclosed or misrepresented during a required pre-sign on or periodic medical fitness exam.[4]

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[3] For example, maintenance and cure may not be owed in the case of willful misconduct such as "gross inebriation" (*Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1942)); fighting where the plaintiff was the aggressor (*Gulledge v. United States*, 337 F.Supp. 1108 (E.D.Pa. 1972), *aff'd*, 474 F.2d 1340 (3d Cir. 1973)); self-inflicted injuries (*Discovery Sun Partnership, Ltd. v. Kapsomenakis*, 2000 AMC 2402 (S.D.Fla. 2000)); and venereal disease (*Ressler v. State Marine Lines, Inc.*, 517 F.2d 579 (2d Cir. 1975), *cert denied*, 423 U.S. 894 (1975).

[4] *See, e.g., Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166 (5th Cir. 2005), *cert denied*, 127 S.Ct. 382 (2006)).

Exposing maritime employers such as cruise lines to punitive damages for making such complicated decisions only further frustrates the otherwise orderly administration of benefits for a huge multinational work force. The disparity between the remedies afforded in most countries for routine situations involving work benefits, and those afforded in the U.S. were punitive damages allowed, would likely lead to a flood of litigation in the Eleventh Circuit by foreign crewmembers shopping for a more generous recovery than available in any other country.

Case law governing the rights and obligations of maritime employers and crewmembers emanating from the Eleventh Circuit greatly impacts CLIA's cruise line members. Florida, which sits in the Eleventh Circuit, remains the center of cruising in the United States, accounting for nearly 54 percent of all U.S. embarkations. Several major cruise lines are headquartered in Miami, Florida. Embarkations from Port Canaveral and Tampa, Florida are increasing. Florida will remain a stronghold in the cruise line industry given the popularity of the nearby Caribbean as a cruise destination.

The Ninth Circuit is also extremely influential in the cruise industry.[5] Although Florida remains the

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[5] As set forth by Petitioners in their Petition for Writ of Certiorari, the Second, Third, Fifth, and Ninth Circuits follow the majority opinion in *Vaughan v. Atkinson*, 369 U.S. 527 (1962) and allow only attorneys' fees for a callous, recalcitrant, willful, and persistent failure to pay maintenance and cure. The

(Continued on following page)

center of cruising in the United States, California's four cruise ports account for approximately 14.5 percent of all U.S. cruise embarkations. Cruise ship operations in Hawaii are increasing, and Alaska and Hawaii remain top U.S. ports of call. Accordingly, the law of the Ninth Circuit, in which California, Hawaii, and Alaska all sit, significantly impacts the cruise line industry.

The lack of a uniform rule among these circuits, let alone others, as to the consequences for alleged willful or arbitrary failure to pay "maintenance and cure" benefits has a significant, negative impact on CLIA's cruise line members who sail throughout the various jurisdictions. As long as the circuits remain split on the issue of the availability of punitive damages as a remedy in maintenance and cure cases, CLIA's cruise line members are unable to weigh the potential consequences of their decisions regarding benefits payable to foreign crew subject to competing legal regimes. They and their crewmembers will bear the economic burden of needless litigation on this issue, fueled by forum shopping created by the disparity in the case law. CLIA is therefore uniquely situated to request that this Court grant certiorari on the issue of whether, and to what extent, punitive

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First, Fourth, Sixth, and Eleventh Circuits have relied on a statement in the *Vaughan* dissent in permitting recovery of punitive damages, over and above attorneys' fees, for such a failure to pay maintenance and cure.

damages are available to crewmembers upon a showing of willful failure to pay maintenance and cure.

The cruise industry substantially benefits the U.S. economy.[6] A uniform and predictable rule potentially affecting the approximately 140,000 crewmembers working aboard CLIA's member's cruise ships will allow employers to understand their liabilities under U.S. law, assess the consequences of their often-difficult benefits determinations, reduce unnecessary litigation, and enable them to continue to offer affordable and diverse vacation choices for the increasing number of passengers,[7] thereby benefitting both the U.S. job market and economy.

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[6] A 2007 annual Business Research Economic Advisors (BREA) study found that the total economic benefit of the cruise industry in the United States is $38 billion and that cruise industry activity generated $15.4 billion in wages and 354,000 jobs for U.S. employees alone.

[7] Over the past 10 years, the industry has responded to extensive market and consumer research that has guided the addition of new destinations, new ship design concepts, new onboard/on-shore activities, new themes and new cruise lengths to reflect the changing vacation patterns of today's market. Over the next three years, nearly 51 million North Americans (from the U.S. and Canada) indicate an interest to cruise with 33.7 million stating a strong intent to act on that interest. By maintaining historical occupancy levels, the cruise industry will welcome 12.8 million guests in 2008.

## SUMMARY OF ARGUMENT

The Eleventh Circuit decided in *Atlantic Sounding Co., Inc., et al. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007) that punitive damages, in addition to attorneys' fees, are available to seamen upon a showing of a willful failure of the shipowner to pay maintenance and cure. *Townsend* brings the absence of uniformity on the issue of punitive damages for a willful failure to pay maintenance and cure to the forefront. This decision further widens an entrenched conflict with the case law of other circuits, creating a four-four circuit split. This case presents an opportunity for the Court to restore uniformity in maritime law, and in so doing, eliminate unnecessary litigation and discourage forum shopping.

This Court has long recognized the importance of maritime law operating uniformly throughout the whole country. Uniformity is essential in the cruise line industry given the transitory and multi-jurisdictional nature of its operations. A lack of uniformity in maritime law, especially laws affecting remedies available to approximately 140,000 crewmembers, engenders confusion and unpredictability resulting in unnecessary litigation. Shipowners and crewmembers are too often unable to amicably resolve maintenance and cure disputes as their divergent positions on the availability of punitive damages (typically the most substantial item of damages sought by crewmembers and their attorneys) results in resort to the courts and unnecessary litigation. The judicial confusion over whether punitive damages are

available, and if so, what the measure of punitive damages is, also engenders additional litigation that a uniform rule would discourage.

Additionally, the lack of uniformity on the issue of a crewmember's available remedies results in forum shopping both domestic and transoceanically. A crewmember with a maintenance and cure claim is encouraged to bring suit in the United States, and disproportionately so in circuits which permit recovery of punitive damages. On the other hand, the lack of uniformity provides incentive for maritime employers to first file declaratory relief actions on their obligation to pay maintenance and cure in jurisdictions which do not permit punitive damages. In either event, the result is unnecessary litigation, including litigation over the appropriateness of the forum (*e.g.*, motions to transfer venue and motions to dismiss for *forum non conveniens*.)

## REASONS TO GRANT CERTIORARI

### I. THE ENTRENCHED CIRCUIT SPLIT IS ERODING THE LONG-STANDING DOCTRINES OF UNIFORMITY AND PREDICTABILITY IN MARITIME MATTERS, RESULTING IN INCREASED LITIGATION

#### A. THE GENERAL PRINCIPLE OF UNIFORMITY UNDER MARITIME LAW

The importance of maritime uniformity is particularly germane to cruise ships sailing throughout

the various jurisdictions of the United States and, indeed, the world. Uniformity of maritime law is a century-old doctrine with its foundation in the United States Constitution. In addition to giving Congress the power to regulate foreign and interstate commerce in Article I, § 8, Clause 3, known as the Commerce Clause, the Framers also provided in Article III, § 2, Clause 1, known as the Admiralty Clause, that the federal judicial power extends to "all cases of admiralty and maritime jurisdiction." This latter provision, though on its face only a jurisdictional grant, has long been construed as incorporating the pre-existing law of admiralty into the law of the United States. "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." *American Ins. Co. v. 356 Bales of Cotton,* (1 Pet.) 511, 545-46 (1828).

The importance of national and international maritime uniformity is well established in the decisions of this Court. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 601 (1974), *reh. denied*, 415 U.S. 986 (1974); *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874). The need for national and international uniformity in admiralty matters is so critical that even Congress is limited in its power to authorize the states to adopt rules of law leading to state-by-state variations. *Knickerbocker Ice Co. v. Stewart*, 253

U.S. 149, 164 (1920). This Court aptly stated long ago:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

*The Lottawanna*, 88 U.S. at 574-75.

The principle of uniformity is particularly important with respect to remedies available to seamen. In *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), this Court held:

> an admiralty court should look primarily to . . . legislative enactments [in the area of seamen's legal protection for injury and death] for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate but we must also keep strictly within the limits imposed by Congress.

*Id.* at 27. The *Miles* Court held that a non-dependent parent of a deceased seaman could not recover non-pecuniary damages (in that case, loss of society damages) because such damages are not available under the dominating statutes governing remedies available to seamen.[8] Courts have cited this opinion in maritime worker personal injury and death cases for what has been termed the "Miles Uniformity Principle."

### B. THE LACK OF PREDICTABILITY REGARDING THE AVAILABILITY OF PUNITIVE DAMAGES IN MAINTENANCE AND CURE CASES RESULTS IN INCREASED LITIGATION

The *Miles* court relied upon this Court's prior decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) which, citing to *The Lottawanna*, reaffirmed the "constitutionally based principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'" *Id.* at 401-402. The *Moragne* Court discussed the importance of the doctrine of *stare*

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[8] The dominating statutes governing remedies available to seamen for personal injury or death are The Jones Act, 46 U.S.C. §§ 30104-30105(b), which incorporates the remedies of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 30302-30303. Neither permit recovery of non-pecuniary damages.

*decisis* to the uniform application of federal admiralty law and identified three factors for a court's consideration before overruling a past decision, the first of which is particularly pertinent to this discussion of uniformity. The first factor is "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Id.* at 403. The *Moragne* Court explained, "The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts." *Id.* Citing *Moragne*, one district court recognized:

> the need for predictability in the commercial maritime arena is arguably greater than in other areas of law and commerce. This is true because there are already numerous and inherently unpredictable factors stemming from the perils of the sea and the continual – and frequently fortuitous – interaction with enterprises of other nations. It is axiomatic that when the rules of law are clear, parties may contract within or around their boundaries, and the commercial system is facilitated in many ways, including reduced litigation, more favorable insurance coverage, and overall ease of application.

*Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137-1138 (5th Cir. 1995).

The entrenched four-four circuit split on the issue of availability of punitive damages for a willful failure to furnish maintenance and cure results in increased litigation. While the law on this issue remains unclear, parties' ability to settle disputes without resort to the courts is hampered as they cannot gauge the legal consequences of their actions. For example, a cruise line may deny maintenance and cure to a crewmember, arguing that the crewmember's injury or disability was the result of willful misconduct in the form of "gross inebriation," a valid basis for denying maintenance and cure.[9] The crewmember may dispute the denial of maintenance and cure, arguing his injury or disability was the result of only ordinary drunkenness.[10] In attempting to resolve this dispute over maintenance and cure, the crewmember would likely assert entitlement to punitive damages for a willful failure to provide maintenance and cure while the cruise line would take the position that punitive damages are not recoverable. The opposing expectations of the parties concerning a significant, if not the largest, item of the crewmember's alleged damages will prevent the parties from assessing the legal consequences of their respective positions and

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[9] *See*, footnote 2, *supra*.

[10] Some courts have held that a crewmember's mere drunkenness (as opposed to "gross inebriation") is not a valid defense to a claim for maintenance and cure. *Bentley v. Albatross S.S. Co.*, 203 F.2d 270 (3d Cir. 1953); *Ellis v. American Hawaiian S.S. Co.*, 165 F.2d 999 (9th Cir. 1948).

thus thwart an amicable resolution of their dispute without resort to the courts.

Maritime employers, including CLIA's cruise line members, are entitled to predictability with respect to the remedies of its crewmembers. Although CLIA's cruise line members are committed to the payment of maintenance and cure in all appropriate cases where foreign law does not dictate the benefits and remuneration available, the motive of maritime employers is ultimately irrelevant to the principle of predictability. As this Court recently stated in *Exxon Shipping Company v. Baker*, 128 S.Ct. 2605, 2627 (2008), "a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another. [Citation omitted.]" In *Baker*, this Court considered the appropriate amount or ratio of punitive damages in a maritime case but did not decide the broader question of whether punitive damages are available under maritime law;[11] nor did this Court decide the more specific question of whether punitive damages are available for a willful failure to pay maintenance and cure. However, this Court's discussion of predictability

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[11] As set forth in Petitioners' Petition for Writ of Certiorari, this Court's *Baker* decision did not present an opportunity to decide the broader issue of whether punitive damages were available at all under the general maritime law. This Court noted in *Baker*, "[Exxon] does not offer a legal ground for concluding that maritime law should never award punitive damages. . . ." *Id.* at 2620-21.

applies herein, *a fortiori*. If a person is entitled to predictability as to the *amount* of a punitive damages award, then maritime employers are certainly entitled to know whether punitive damages are even available in the case of a willful failure to pay maintenance and cure.

Furthermore, if even a "bad man" is entitled to predictability, then certainly maritime employers are entitled to the same predictability regarding the remedies available to their crewmembers so that they can know the consequences of their decisions to either pay or deny maintenance and cure in those close or unclear cases, where the issue typically arises. As mentioned above, where the crewmember's injury or disability may be attributable to the crewmember's own willful misconduct, such as gross inebriation, the shipowner can lawfully deny maintenance and cure but also subjects itself to a suit for failure to pay maintenance and cure. Such employer is entitled to know the remedies available to its crewmembers, and thus, the consequences of its decisions. Additionally, the world of medicine is expanding to include holistic and experimental treatments about which the maritime employer may have legitimate concerns, but for which the employer may feel bound to pay in order to prevent any allegation of willful failure to pay maintenance and cure. Encouraging the payment for such holistic and experimental treatments without careful examination simply to avoid punitive damage exposure may become problematic if the unproven treatment goes horribly wrong for the seaman.

### C. THE JUDICIAL CONFUSION FOLLOWING *VAUGHAN* RESULTS IN INCREASED LITIGATION

Petitioners' Petition for Writ of Certiorari details the evolution of the judicial confusion in the circuit courts regarding the availability of punitive damages, in addition to attorneys' fees, for a willful failure to pay maintenance and cure. The source of the confusion can be traced to this Court's opinion in *Vaughan v. Atkinson*, 369 U.S. 527 (1962). In *Vaughan*, the majority found that a crewmember is entitled to attorneys' fees in the case of a callous, recalcitrant, willful, and persistent failure to pay maintenance and cure, holding "[w]hile failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows . . . the recovery may also include 'necessary expenses.'" [Internal citations omitted.] *Id.* at 530. Nowhere does the majority mention punitive or "exemplary" damages. The cases cited by *Vaughan* for the proposition that a crewmember is entitled to attorneys' fees are not punitive damages cases.[12]

Indeed, *Vaughan* seemingly permitted recovery of attorneys' fees as an item of *compensatory damages* to

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[12] In *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932), this Court held: "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only ***necessary expenses***, but also compensation for the hurt." (Emphasis added.)

bring the seaman back to the position he was in prior to denial of maintenance and cure, which necessarily included his attorney's fees, and not as an item of punitive damages. As one circuit court later explained, "We are also mindful that maintenance and cure is a pseudo-contractual obligation, [internal citation omitted], and that absent contrary authority – which *Vaughan* does not afford – punitive damages are not normally recoverable on contract claims." *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505 (9th Cir. 1995), *cert denied*, 516 U.S. 1046 (1996). In deciding the present matter of *Townsend*, the Eleventh Circuit noted that it had previously "acknowledge[d in *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187 (11th Cir. 1987)] that it was unclear whether the *Vaughan* majority regarded attorney's fees as an item of compensatory damages or as a punitive measure." *Townsend, supra*, 496 F.3d at 1285, fn. 2.

Nevertheless, some courts have held that *Vaughan* permits recovery of *attorneys' fees only* as an item of punitive damages. *Kraljic v. Berman Enter.*, 575 F.2d 412, 415 (2d Cir. 1978). Other courts have held that punitive damages *in addition to attorneys' fees* are available in cases of willful failure to pay maintenance and cure.[13] The present judicial confusion stems from a statement in *Vaughan*'s dissenting

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[13] *See, e.g., Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973).

opinion that a seaman should recover "exemplary damages" which "would not be measured by the amount of counsel fees." *Vaughan*, 369 U.S. at 534-40. The Second Circuit found "obvious difficulty with . . . follow[ing] the views of the dissenters in [*Vaughan*] and not the majority." *Kraljic, supra.*

The circuits are additionally confused as to the appropriate standard for an award of attorneys' fees and/or punitive damages. In *Vaughan*, this Court noted the maritime employers in that case were:

> *callous* in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that *recalcitrance*, libellant was forced to hire a lawyer and go to court to get what was plainly owed him. . . . The default was *willful* and *persistent*. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one. [Emphasis added.]

369 U.S. at 530-531.

However, subsequent circuit court decisions diluted the *Vaughan* standard to allow an award of punitive damages for the "arbitrary" failure to pay maintenance and cure. Before overruling its precedent awarding punitive damages in maintenance and cure cases in light of *Miles,* the Fifth Circuit cited *Vaughan* for the proposition that "an employer's *willful and arbitrary* refusal to pay maintenance and cure gives rise to a claim for damages in the form of attorneys' fees in addition to the claim for general

damages." [Emphasis added.] *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984). Other courts subsequently adopted this new standard. For example, the Fourth Circuit cited *Holmes* and noted, "courts have long awarded punitive damages to seamen where maintenance and cure benefits have been *arbitrarily* and *willfully* denied." [Emphasis added.] *Manuel v. United States*, 50 F.3d 1253, 1260 (4th Cir. 1995).

The Eleventh Circuit's decision in *Hines*, upon which the *Townsend* court held it was bound, also exemplifies the diluted standard for circumstances wherein courts will permit awards of punitive damages:

> Although there is no bright line to measure arbitrary conduct, the Fifth Circuit has identified examples of willfulness meriting punitive damages and counsel fees [including] . . . laxness in investigating a claim. . . .

*Hines*, *supra*, 820 F.2d at 1190. Between *Vaughan* and *Hines*, the degree of odious conduct upon which an award of punitive damages could be based was lowered from a callous, recalcitrant, willful, and persistent failure to even investigate a crewmember's maintenance and cure claim to allow punitive damages recovery for a mere arbitrary "laxness in investigating a claim." This reflects the judicial confusion not only about whether *Vaughan*'s grant of attorneys' fees was compensatory or punitive in nature and, therefore, whether punitive damages are even available for the willful failure to pay maintenance and

cure, but also the type of conduct upon which a punitive damage award can be based.

## II. A UNIFORM RULE REGARDING THE AVAILABILITY OF PUNITIVE DAMAGES IN MAINTENANCE AND CURE CASES WILL ELIMINATE "THE MISCHIEF OF FORUM SHOPPING" AND REDUCE LITIGATION OF CASES IMPROPERLY BROUGHT IN U.S. COURTS

The current circuit split on the issue of whether punitive damages are available for a willful failure to pay maintenance and cure encourages forum shopping.[14] A crewmember with a maintenance and cure claim is encouraged to bring suit in the circuits which permit recovery of punitive damages, regardless whether the case is more appropriately brought, or more convenient, in a jurisdiction which does not permit recovery of punitive damages. Similarly, maritime employers are encouraged to bring declaratory relief actions in jurisdictions where punitive damages are not allowed. In either event, the result is

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[14] This Court has described forum shopping as plaintiff's pursuit of 'justice blended with some harassment.' *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *see also, Norex Petroleum, Ltd. v. Access Indus.*, 416 F.3d 146, 155 (2d Cir. 2005), *cert denied*, 547 U.S. 1175 (2006). Indications of forum shopping include, in part: "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, [and] the habitual generosity of juries in the United States or in the forum district." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001).

increased litigation including motions to transfer venue and motions to dismiss for *forum non conveniens* which would otherwise be discouraged by circuit uniformity and the consequent disincentive to forum shop.

Courts have repeatedly fashioned rules to avoid the negative impact of "forum shopping" resulting from non-uniform application of maritime rules and laws. In *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 230 (1958), Justice Brennan recognized the "mischief" of forum shopping which results from application of varying state statutes of limitations to maritime actions:

> The alternative of subjecting the parties' rights to the variant state statutes of limitations and the consequent uncertainty of legal obligation would inject an unnecessarily sporting element into the affairs of men. . . . The mischief to be avoided is the possibility of shopping for the forum with the most favorable period of limitations. In actions arising at sea, frequently beyond the territorial bounds of any State, normal choice-of-law doctrines are likely to prove inadequate to the task of supplying certainty and predictability.

In enacting a uniform three-year statute of limitations for maritime personal injury and death actions, Congress also considered the "mischief" of forum shopping as recited by the First Circuit in

*Butler v. American Trawler Co.*, 887 F.2d 20, 22 (1st Cir. 1989):

> Congressman Murphy, a sponsor of the provision, told the House of Representatives:
>
> > The act is . . . aimed at eliminating the forum shopping and the presentation of stale claims which can result when claimants seek to bring their suit in the jurisdiction having the most advantageous procedural rules. . . . The Congress should take action to eliminate the inherent unfairness that exists when three claimants may be subject to three different sets of rules merely because they have utilized different legal tools.
>
> 126 Cong.Rec. 2591 (1980) (statement of Rep. Murphy). See 126 Cong.Rec. 26,884 (1980) (statement of Sen. Cannon) (section 763a will eliminate "the mischief of forum shopping"); 126 Cong.Rec. 2592 (1980) (statement of Rep. Dornan) (section 763a will eliminate inconsistency associated with doctrine of laches, which "often allow[ed] litigants bringing suit to pick the court with the most favorable interpretation of timeliness"); H.R.Rep. No. 737, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S. Code Cong. & Admin.News 3303 (section 763a is needed because "divergent interpretations of timeliness for bringing an unseaworthiness claim have resulted in many litigants choosing the most favorable forum in which to bring suit").

Federal courts have discouraged forum shopping in a variety of other maritime contexts. In *Silver Star Enters. v. Saramacca MV*, 82 F.3d 666, 669 (5th Cir. 1996), the Fifth Circuit held with respect to maritime lien law:

> . . . there is much to be said for legal consistency and predictability. A decision by this circuit creating a circuit split and permitting the affixation of maritime liens for bulk container lessors would spawn uncertainty, *compounded by forum-shopping* and extravagant lien claims. (Emphasis added.)

In *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir. 1993), *cert denied*, 510 U.S. 915 (1993), the Sixth Circuit found that applying indemnity principles in maritime strict products liability would violate the doctrine of uniformity as other maritime statutes such as the Jones Act, DOHSA, and the Longshore and Harbor Workers' Compensation Act ("LHWCA") apply principles of comparative fault. The court held:

> to allow indemnity in a strict products liability claim, while all other maritime claims are subject to contribution based on comparative fault would cause seamen to 'attempt to escape the comparative fault of the traditional theory of unseaworthiness and label their case (sic) products cases.' [Citation omitted.] This could lead to forum shopping by seamen seeking to obtain recovery under products

> liability theories without reduction for their own contributory fault. [Citation omitted.]

*Id.* at 1462.

This Court has also addressed the menace of transoceanic forum shopping. In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court reversed the previous admiralty rule against "divided damages,"[15] finding: "Indeed, the United States is now virtually alone among the world's major maritime nations in not adhering to the Convention with its rule of proportional fault – a fact that encourages transoceanic forum shopping." *Id.* at 403-404. [Footnote omitted.]

To combat forum shopping by foreign plaintiffs improperly bringing suit in the United States solely to benefit from the more generous relief provided by U.S. courts than their home countries, courts have granted dismissal on the grounds of *forum non conveniens*. The Eleventh Circuit upheld such a dismissal in *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (11th Cir. 1985), describing the plaintiff as "the archetypal foreign plaintiff bringing her foreign tort claim to American courts to secure relief more generous than she would get under the law of her homeland [Greece]." *Id.* at 1520.

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[15] The "divided damages" rule, typically in collision cases, required the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of fault may have been. *Id.* at 397.

Regardless whether this Court rules that punitive damages are available or not for a willful failure to pay maintenance and cure, as long as the law remains unclear, foreign plaintiffs will continue to disproportionately bring suit in those U.S. Circuits which permit punitive damages, even where there is little connection to or interest in the United States resolving the foreign dispute, because punitive damages are widely disapproved of and not recognized in most of the world.[16] Foreign crewmembers injured abroad continue to file suit in the U.S. in light of the specter of punitive damages even though, under *Vaughan,* it is unclear that such damages are available. The *Townsend* case presents a timely opportunity for this Court to clarify *Vaughan* and discourage forum shopping.

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[16] This Court, citing to an international law scholar, recently noted that "punitive damages are higher and more frequent in the United States than they are anywhere else." *Baker, supra*, 128 S.Ct. at 2623.

## CONCLUSION

As the chasm between the circuits widens on the issue of availability of punitive damages for a willful failure to pay maintenance and cure, the *Townsend* case presents a timely opportunity for this Court to reestablish uniformity which has eroded as the result of judicial confusion since its *Vaughan* decision. This Court recently spoke to its responsibility to clarify confusion generated by its judicially-created law. In limiting punitive damages to a 1:1 ratio in *Baker*, this Court noted that the remedy of punitive damages "is itself entirely a judicial creation" and concluded that it "may not slough off [its] responsibilities for common law remedies because Congress has not made a first move. . . ." 128 S.Ct. at 2630.

In *Townsend*, the court held it was bound by Eleventh Circuit precedent which permitted punitive damages for a willful failure to pay maintenance and cure. The concurring opinion in *Townsend* aptly stated that adhering to precedent "promotes predictability and stability of the law, it helps to keep the precedential peace among the judges of this Court, and it allows us to move on once an issue has been decided." *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1286 (11th Cir. 2007). While this may be true within the confines of the Eleventh Circuit, this Court's responsibility is broader; its jurisdiction encompasses all eleven circuits, eight of which are presently entrenched in a four-four circuit split. As maritime law must be fashioned in light of its national – and indeed international – ramifications, the

values of predictability, stability, comity, and efficiency cannot be viewed through the prism of one circuit. This Court alone can restore predictability and stability on the national level by clarifying *Vaughan* and restoring uniformity.

Accordingly, CLIA respectfully requests this Court grant certiorari.

DATED: September 19, 2008.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 08-214

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

vs.

EDGAR L. TOWNSEND,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* UNITED MARITIME GROUP, LLC IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICUS CURIAE*

*Amicus*, United Maritime Group, LLC, is engaged in the marine transportation industry and transports coal, petroleum coke, phosphate, grain and other bulk commodities domestically and internationally.[1] United Maritime Group, LLC, based in Tampa, Florida, and within the Eleventh Circuit, operates U.S. United Ocean Services, a U.S. flag oceangoing fleet which is the largest U.S. coastwise dry bulk carrier. United Maritime Group, LLC also operates U.S. United Barge Line, a river barge fleet consisting of twenty towboats and approximately 700 barges, on the inland waterways of the United States. In addition, United Maritime Group, LLC operates U.S. United Bulk Terminal, a dry bulk commodity and deep-water transfer and storage terminal and U.S. United Bulk Logistics which combines the resources of United Marine Group into a customized and integrated marine transportation and distribution system.

In connection with these operations, United Maritime Group, LLC and its subsidiaries employ

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief which is filed with the written consent of all parties pursuant to Sup. Ct. R. 37.2(a).

Jones Act seamen in various capacities from ordinary seamen to chief engineers and vessel masters. As such, United Maritime Group, LLC is required to handle and adjust claims of its seamen employees who fall ill or become injured while in the services of its respective vessels.

The particular issue in this case is whether punitive damages, in addition to attorney's fees, are available to a Jones Act seaman who alleges that he is entitled to maintenance and cure where his shipowner/employer has acted in an arbitrary and willful manner in refusing to provide maintenance and cure. The Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit seeks to resolve a conflict among the Eleventh Circuit, First Circuit and other United States Courts of Appeals on this very issue and to clarify this Court's decision in *Vaughan v. Atkinson,* 369 U.S. 527 (1962), which allowed recovery of attorney's fees but not punitive damages.

*Amicus*, United Maritime Group, LLC, does not have any direct exposure for the risks incurred by Petitioners as a result of the injuries allegedly sustained by Respondent. However, whether punitive damages may be imposed upon a shipowner/employer in addition to its obligation to provide maintenance and cure is of a vital interest to United Maritime Group. The unauthorized and erroneous rule announced by the Eleventh Circuit in the decision below, one based on procedural constraint rather than substantive analysis, unduly burdens the Petitioners

in this case and adversely affects other vessel operators in the maritime industry. A conflict between the Eleventh Circuit and the other Courts of Appeals interferes with the uniform application of maritime law throughout the United States and unduly prejudices shipowners, such as United Maritime Group, whose operations are based in the Eleventh Circuit.

*Amicus Curiae* seeks to bring to the attention of this Court relevant matters not specifically addressed which may be of considerable help to the Court in correcting the error below and resolving the conflict existing in the appellate courts.

## STATEMENT

Respondent, Townsend, allegedly sustained personal injury while employed by Petitioners, Atlantic Sounding Co., Inc. and Weeks Marine, Inc., as a seaman and member of the crew of Petitioners' vessel. Petitioners initiated a Declaratory Judgment action in the United States District Court for the Middle District of Florida seeking declaration of its maintenance and cure obligation to the Respondent who in turn brought suit against Petitioners for negligence under the Jones Act, unseaworthiness and maintenance and cure under the general maritime law, together with a claim for punitive damages for Petitioners' alleged arbitrary and willful failure to provide maintenance and cure. Respondent also brought a Counterclaim against Petitioners in the Declaratory

Judgment action asserting the very same causes of action.

The district court denied Petitioners' motion to dismiss Respondent's punitive damage claim on the maintenance and cure count because of Eleventh Circuit precedent, *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), but certified the issue for interlocutory appeal. The Eleventh Circuit affirmed but acknowledged that it was constrained to follow its prior decision in *Hines* by the Circuit's procedural rule that a later panel is duty bound to follow a previous panel decision unless that earlier decision conflicts with a later Supreme Court decision precisely on point even though the rationale of the later Supreme Court decision supports reversal. *Atlantic Sounding Co. v. Townsend,* 496 F.3d 1282 (11th Cir. 2007) (Carnes, J., concurring). Thus, the legal issue presented here is whether Respondent, a Jones Act seaman, may maintain an action for punitive damages against his shipowner/employer for its alleged arbitrary and willful failure to provide maintenance and cure. Stated otherwise, may the Eleventh Circuit, or any other lower court, permit a seaman's action for punitive damages on the allegation that his employer was arbitrary and willful in refusing to provide maintenance and cure based upon a minority, dissenting opinion in this Court's decision of *Vaughan v. Atkinson*, 369 U.S. 527 (1962), and, if so, whether a contrary result is compelled by this Court's subsequent decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). As amply demonstrated by Petitioners,

there is a split in the Circuit Courts of Appeals on the issue presented which prohibits the uniform application of federal maritime law and requires this Court's review.

## SUMMARY OF ARGUMENT

Constitutional principles dictate that federal admiralty law be developed and applied as a system of law coextensive with and operating uniformly throughout the country. In this context, *Vaughan v. Atkinson*, 369 U.S. 527 (1962), authorized the award of attorney's fees to a Jones Act seaman in a maintenance and cure case where the shipowner/employer's failure to provide maintenance and cure was described as callous, willful and persistent. The majority in *Vaughan* awarded counsel fees to compensate the seaman and make him whole for the expenses he was forced to incur in bringing the action to recover the maintenance and cure to which he was clearly entitled. In dissenting, the minority, though mindful that the purpose of maintenance and cure was to make the seaman whole, was troubled with the award of counsel fees because it could find no authority for that award as compensatory damages. Rather, the dissent suggested that exemplary damages, not necessarily measured by counsel fees, could be awarded as indirect compensation for such – litigation related – expenditures. That the *Vaughan* decision was limited to the award of attorney's fees and did not authorize punitive damages was confirmed

by the district court's damage award on remand. *Vaughan v. Atkinson*, 206 F.Supp. 575 (E.D.Va. 1962).

Subsequently, certain lower courts impermissibly ignored the precedent established by the majority in *Vaughan* and misinterpreted the minority's dissent as authorizing the recovery of punitive damages beyond the award of attorney's fees where the shipowner/employer arbitrarily and capriciously failed to investigate or refused to provide maintenance and cure in response to a seaman's claim. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Holmes v. J. Ray McDermott Co.*, 734 F.2d 1110 (5th Cir. 1984); *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987). Other courts continued to follow the Supreme Court precedent of *Vaughan v. Atkinson* and allowed recovery of attorney's fees only for the willful nonpayment of maintenance and cure. *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412 (2nd Cir. 1978).

This Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), effectively foreclosed any contention that punitive damages may be awarded based on the shipowner/employer's callous, willful and persistent refusal to provide maintenance and cure. In *Miles*, this Court held that non-pecuniary damages could not be recovered by the survivors of a Jones Act seaman in a wrongful death suit brought under the judicially recognized general maritime law unseaworthiness cause of action. The Court reasoned that admiralty principles of uniformity and the Congressional designation of pecuniary damage recovery through the Death on the High Seas Act

supported that result. The Court's decision in *Miles* was also based upon the Jones Act and its incorporation of the Federal Employers' Liability Act with its longstanding judicial interpretation as providing only for the recovery of pecuniary damages. In *Miles*, this Court concluded that the general maritime law may not be used to expand available damages where Congress has prescribed appropriate statutory relief. *Miles*, 496 U.S. at 36.

The rationale of *Miles*, which limits recovery to pecuniary loss, is equally applicable to the factual context of a general maritime law maintenance and cure damage claim which necessarily implicates the Jones Act – the statute specifically regulating the rights and liabilities of a seaman and his employer. For this reason, the Fifth Circuit reversed its decision in *Holmes* and held that punitive damages are not recoverable in a seaman's suit to recover damages for his employer's alleged arbitrary and capricious refusal to provide maintenance and cure. *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995). This decision followed on the heals of the Ninth Circuit's rejection of the *Pocahontas* decision based on that Court's conclusion that the majority rule in *Vaughan v. Atkinson* limited recovery to counsel fees for the employer's callous, willful and persistent refusal to provide maintenance and cure and was in all respects consistent with *Miles*. *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995). More recently, the Third Circuit followed *Miles* and sided with a majority of courts holding that

punitive damages are not available in a seaman's maintenance and cure damage claim. *Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007). The Eleventh Circuit, whose decision is the subject of this writ application, has declined to reconsider its precedent notwithstanding this Court's intervening decision in *Miles*.

To maintain uniformity in this area of the general maritime law, this Court should grant Petitioner's writ, reverse the Eleventh Circuit decision in *Atlantic Sounding Co. v. Townsend* and confirm the holding of *Vaughan*, reinforced by *Miles*, that punitive damages are not available to a Jones Act seaman who seeks damages for his employer's callous, willful and persistent refusal to provide maintenance and cure.

## ARGUMENT

Judicially fashioned admiralty law is not created in a vacuum and appropriate federal legislation has routinely provided policy guidance for the refinement of such laws. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Amicus* United Maritime Group is cognizant of this Court's in-depth knowledge of the general maritime law obligation of a shipowner who employs seamen to provide maintenance and cure to its seamen who fall ill or become injured while in the service of the ship. The duty to provide maintenance and cure originated in ancient sea codes, was recognized by Justice Story in 1823 and was the first of the

four propositions concerning the legal rights of seaman arising from their employment as recognized by this Court in *The Oceola*, 189 U.S. 158 (1903). The second proposition acknowledged a seaman's right to recover for injuries caused by the unseaworthiness of the ship. The third and fourth propositions of *The Oceola* embodied the fellow servant rule and the prohibition against a seaman's recovery of damages for the negligence of the master or members of the crew. Congress passed the Jones Act in 1920 to override the latter two propositions and afforded a seaman a cause of action to recover damages caused by his employer's negligence. 46 U.S.C. § 30104-30105. As a result, the causes of action available to a seaman arising out of his employment by a shipowner are for maintenance and cure, unseaworthiness, and negligence under the Jones Act.

This Court's decision in *Vaughan v. Atkinson*, 369 U.S. 527 (1962) involved an admiralty action brought by a seaman to recover maintenance and cure and damages for the employer's failure to provide maintenance and cure. The Court described the employer's conduct as follows:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under the laws that are centuries old. The default was willful and

> persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

369 U.S. at 530-531. Accordingly, the Court authorized the seaman's recovery of counsel fees to compensate the seaman for "damages suffered" – the legal expenses he was forced to incur. The *Vaughan* majority neither considered nor awarded punitive damages.

The dissent recognized that a seaman is entitled to recover compensatory damages for physical injuries sustained as a result of his employer's unreasonable refusal to provide maintenance and cure but was of the view that counsel fees could not be recovered as compensatory damages. Accordingly, the dissent was of the view that if the shipowner's refusal to pay maintenance and cure was wanton and intentional, the seaman could recover exemplary damages as indirect compensation for his litigation expenses. 369 U.S. at 539.

The proper interpretation accorded *Vaughan*'s holding is set forth in the district court's decision on remand. There, Chief Judge Walter E. Hoffman stated:

> As this court interprets the language of the Supreme Court, the intent and purpose of the same is that the trial court should make the seaman "whole", i.e., he should not be required to pay money out of his pocket to collect maintenance lawfully due to him. To accomplish this fact, the respondents are

> required to pay, by way of damages, a reasonable attorney's fee to libellant's proctor for prosecuting the proceeding made necessary to collect the seaman's maintenance claim. . . .
>
> We do not read the majority opinion of the Supreme Court as suggesting that punitive damages are in order.

*Vaughan v. Atkinson,* 206 F.Supp. 575, 576 (E.D.Va. 1962). Accordingly, *Vaughan* did not furnish a precedential basis for the award of punitive damages in a maintenance and cure case and the Petitioner's writ herein should be granted for that reason alone.

Eleven years after the *Vaughan* decision, the Third Circuit Court of Appeals affirmed an award of punitive damages to a seaman whose employer had been arbitrary and capricious in refusing to provide maintenance and cure. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (3d Cir. 1973). The Third Circuit disregarded the majority's holding in *Vaughan* and not only followed the dissent in *Vaughan* but quoted from Justice Stewart's dissenting opinion which the Third Circuit viewed as "seemingly in agreement with the majority's fundamental premise,. . . . " Of course, the Third Circuit's view would only be accurate if it limited the seaman's award to the recovery of attorney's fees. This was precisely the holding of the Second Circuit which adhered to the majority decision in *Vaughan* and allowed only recovery of attorney's fees for the willful nonpayment of maintenance and cure. *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412

(2d Cir. 1978). Thus began the obvious conflict between the Circuits which is appropriately traced in Petitioners' brief and will not be repeated here.

The Fifth Circuit Court of Appeals was the next to erroneously rely on the dissent in *Vaughan* to sustain a seaman's damage award under the guise of punitive damages where the seaman offered no proof of further injury in his claim for damages as a result of his employer's arbitrary and capricious refusal to reinstate maintenance and cure. *Holmes v. J. Ray McDermott Co.*, 734 F.2d 1110 (5th Cir. 1984). The Fifth Circuit in *Holmes* relied on the *Pocahontas* and its more recent decision in *Complaint of Merry Shipping Co.*, 650 F.2d 622 (5th Cir. Unit B 1981) which allowed recovery of punitive damages under the general maritime law to the widow of a deceased seaman who brought a wrongful death action based both on the Jones Act and the unseaworthiness doctrine.

Shortly thereafter, a panel of the newly created Eleventh Circuit held that both reasonable attorney's fees and punitive damages could be awarded in a maintenance and cure case where the shipowner was willful and arbitrary in refusing to provide maintenance and cure. *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987). In reaching this result, the court in *Hines* primarily relied on the dissent in *Vaughan*, its predecessor's decisions in *Merry Shipping* and *Holmes* and the First Circuit's decision in *Robinson v. Pocahontas*.

The inappropriate award of punitive damages in maintenance and cure cases escaped scrunity, for the most part, until this Court's deci n in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In *Miles*, this Court considered whether non-pecuniary damages, specifically loss of society, could be recovered by the survivors of a seaman in a wrongful death general maritime law unseaworthiness action. In addressing this question, the Court referenced its decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which created a general maritime wrongful death cause of action. The *Miles* Court noted that the decision in *Moragne* served a two-fold purpose: (1) to maintain consistency of the general maritime law with the policy considerations of applicable federal legislation, the Jones Act and the Death on the High Seas Act (DOHSA), favoring wrongful death recovery; and (2) to adhere to the principle that federal admiralty law should be a system of law co-extensive with and operating uniformly in the whole country. *Moragne*, 398 U.S. at 402. Next, *Miles* focused on the Jones Act and the Death on the High Seas Act, and stated:

> In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters,

> and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

*Miles*, 498 U.S. at 27. The *Miles* Court then observed that the Death on the High Seas Act explicitly provided for the recovery of pecuniary damages and that the Jones Act incorporated the provisions of the Federal Employer's Liability Act which had been judicially interpreted to provide only for the recovery of pecuniary damages. *Miles*, 498 U.S. at 31. Accordingly, neither Act authorized the recovery of non-pecuniary damages. Guided by these legislative acts and the desire to achieve uniformity, the Court held that non-pecuniary damages could not be recovered under a general maritime law cause of action. In so holding, the Court stated:

> Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.

*Miles*, 498 U.S. at 36. Accordingly, *Miles* instructs that the general maritime law may not be used to expand the available damages where Congress has provided the statutory relief it deems appropriate.

The principle of uniformity with respect to the recovery of damages under the general maritime law, as reinforced by *Miles*, has received widespread

application in an overwhelming majority of federal maritime law decisions. The *Miles* prohibition against recovery of non-pecuniary damages has been applied to personal injury actions brought pursuant to the general maritime law; the rationale of *Miles* has precluded recovery of loss of society and consortium to the spouses and children of injured seamen. *See, for example, Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127 (5th Cir. 1992); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992); *see also Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) and *Lollie v. Brown Marine Serv., Inc.*, 995 F.2d 1565 (11th Cir. 1993).

In keeping with the mandate of *Miles*, the U.S. Sixth Circuit articulated a uniform rule denying recovery of punitive damages in an action brought under the general maritime law for the alleged wrongful death of a seaman. *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 510 U.S. 915, (1993). It is universally accepted that punitive damages, regardless of purpose, are non-pecuniary in nature. The U.S. First Circuit performed the analysis required by *Miles* in *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994), and concluded that punitive damages are not available to an injured seaman in an unseaworthiness action under the general maritime law.

In 1995 the U.S. Fifth Circuit reviewed the developments in the maritime law following *Miles* when reconsidering, *en banc*, whether punitive damages could lawfully be awarded in a general maritime

law maintenance and cure action. *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995). The *en banc* court held that in view of the uniformity principle of *Miles*, its prior decision in *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981) – which held that punitive damages could be recovered in a general maritime law unseaworthiness action – was no longer good law and had been overruled. Because of the potential Jones Act/general maritime law overlap in the factual circumstances giving rise to the claim for maintenance and cure, the Fifth Circuit concluded that the *Miles* uniformity principle precluded a general maritime law action for punitive damages. *Guevara*, 59 F.3d at 1512. Accordingly, the *en banc* Fifth Circuit reversed its earlier decision in *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984).

The statutory overlap between the Jones Act and the maintenance and cure doctrine of the general maritime law exists as a matter of law and federal admiralty practice. Only a seaman within the meaning of the Jones Act is entitled to the recovery of maintenance and cure and resulting damages for his employer's wrongful refusal to pay. *Hall v. Diamond M Co.*, 732 F.2d 1246 (5th Cir. 1984). A seaman's claim for damages based upon his employer's unreasonable refusal to provide maintenance and cure gives rise to both a cause of action under the general maritime law and the Jones Act. *The Iroquois*, 194 U.S. 240 (1904); *Cortes v. Baltimore Insular Lines*, 287 U.S. 367 (1932). A seaman's suit for the recovery

of personal injury sustained in the course and scope of his employment is routinely brought in a combined Jones Act, unseaworthiness and maintenance and cure action. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958). In such cases, a seaman is afforded a jury trial on his general maritime law claims by virtue of their combination with his Jones Act claim. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). It must be remembered that the Jones Act was enacted specifically to modify the general maritime law applicable to seamen as expressed in *The Oceola*.

Therefore, the removal of a punitive damage award from a maintenance and cure action promotes harmony between the general maritime law and the Jones Act, the foremost enactment in the field of maritime tort law. *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). That harmony is best demonstrated by the Ninth Circuit's decision in *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), which rejected the holding of *Robinson v. Pocahontas, Inc.* and dutifully followed the majority's decision in *Vaughan v. Atkinson* and held that attorney's fees, but not punitive damages, could be recovered for the employer's arbitrary and capricious refusal to provide maintenance and cure. In so holding, the Ninth Circuit observed that its decision in *Glynn* was entirely consistent with the reasoning of *Miles*.

Just last year, the Third Circuit followed *Miles* and joined the majority of courts holding that punitive

damages are not available in a seaman's maintenance and cure damage claim. *Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007). Notwithstanding the abundance of authority, the Eleventh Circuit in *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007), refused to reconsider its questionable precedent of *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), which was decided prior to this Court's decision in *Miles*. The obvious split in the Circuits and the Eleventh Circuit's refusal to consider *Miles* also requires this Court's review.

This Court's recent decision in *Exxon v. Baker*, ___ U.S. ___, 128 S.Ct. 2605 (2008), does not warrant a different result. In *Exxon*, the Court was evenly divided on whether maritime law recognizes derivative corporate liability for punitive damages based on the actions of managerial agents; accordingly, this decision is not precedential on that issue. Moreover, in its analysis of the Clean Water Act, this Court found "no clear indication of Congressional intent to occupy the entire field of pollution remedies . . . nor for that matter do we perceive that punitive damages for private harms will have a frustrating effect on the CWA remedial scheme,. . . . " 128 S.Ct. at 2619. To the contrary, this Court has previously held that with respect to the non-pecuniary measure of damages provided through the Jones Act and the Death on the High Seas Act, "when Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is . . . no cause for enlargement of the

damages statutorily provided." *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199 (1996) (citing *Miles v. Apex Marine*).

## CONCLUSION

For the foregoing reasons and those stated in the Brief of Petitioners, the Petition for a Writ of Certiorari should be granted. To maintain uniformity in this area of the general maritime law, this Court should reverse the Eleventh Circuit decision in *Atlantic Sounding Co. v. Townsend* and confirm the holding of *Vaughan*, reinforced by *Miles*, that punitive damages are not available to a Jones Act seaman who seeks damages for his employer's alleged callous, willful and persistent refusal to provide maintenance and cure.

Respectfully submitted,

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# PETITIONER'S BRIEF

114

No. 08-214

Supreme Court, U.S.
FILED
DEC 18 2008
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# In The Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

v.

EDGAR L. TOWNSEND,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITIONERS' BRIEF ON THE MERITS

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## QUESTION PRESENTED

May a seaman recover punitive damages for the willful failure to pay maintenance and cure?

## PARTIES TO THE PROCEEDING

Petitioners are Atlantic Sounding, Inc. and Weeks Marine, Inc., defendants-appellants below. Respondent is Edgar L. Townsend.

## RULE 29.6 DISCLOSURE

Atlantic Sounding, Inc. is a wholly owned subsidiary of Weeks Marine, Inc. Weeks Marine, Inc. is a privately held corporation.

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## OPINIONS BELOW

*Atlantic Sounding Co. v. Townsend*, No. 3:05-CV-649, 2006 WL 4702150 (M.D. Fla. April 20, 2006)

*Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007)

## JURISDICTION

The trial court certified a legal question to the Eleventh Circuit under 28 U.S.C. § 1292(b). On 23 August 2007, the Eleventh Circuit answered the certified question and created conflict with other circuits and two state courts of last resort. On 27 May 2008, the Eleventh Circuit denied Weeks Marine's request for an en banc rehearing. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the Eleventh Circuit's decision.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, Section 2:

> The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . .

The Federal Employer's Liability Act, 45 U.S.C. § 51:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier. . . .

The Jones Act, 46 U.S.C. §§ 30104-30105(b):

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law . . . against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.
>
> * * *
>
> [A] civil action for maintenance and cure or for damages for personal injury or death may not be brought under a maritime law of the United States if . . . the individual suffering the injury . . . was not a citizen or permanent resident alien of the United States . . . the incident occurred in the territorial waters . . . overlaying the continental shelf of a country other than the United States . . . and the individuals suffering the injury . . . was

> employed . . . by a person . . . engaged in the exploration . . . of energy resources. . . .

The Death on the High Seas Act, 46 U.S.C. §§ 30302-30303:

> When the death of an individual is caused by wrongful act . . . occurring on the high seas . . . of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. . . .
>
> * * *
>
> The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought.

## STATEMENT OF THE CASE

### I. Introduction and Factual Background

The Eleventh Circuit's holding that allows seaman Edgar Townsend to recover punitive damages for the willful failure to pay maintenance and cure is contrary to the "uniformity principle" articulated by this Court in *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990). *Miles* holds that seamen's remedies for their general maritime law causes of action must be consistent with the remedies available under the

Jones Act and the Death on the High Seas Act ("DOHSA").[1] *Miles*, 498 U.S. at 29.

In this case, Mr. Townsend asserts claims for unseaworthiness and maintenance and cure under general maritime law and a claim for negligence under the Jones Act. *Miles* confirms that non-pecuniary remedies are not available pursuant to the Jones Act or DOHSA. *Miles*, 498 U.S. at 31. Punitive damages are non-pecuniary damages. *Barnes v. Gorman*, 536 U.S. 188, 189 (2002); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1506, n.7 (5th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1046 (1996).

Despite these holdings, Mr. Townsend demands punitive damages as a remedy for his maintenance and cure claim. The Eleventh Circuit's decision allowing Mr. Townsend to seek punitive damages violates the *Miles* uniformity principle by permitting the recovery of a remedy that is not available under the Jones Act or DOHSA.

## II. Proceedings Below

On 16 March 2006, Weeks Marine filed its Motion to Strike or, in the Alternative, Dismiss Mr. Townsend's Request for Punitive Damages ("Motion to Strike"). Weeks Marine's Motion to Strike included the argument that *Miles* precluded Mr. Townsend

---

[1] *See* 46 U.S.C. §§ 30104-30105; 46 U.S.C. §§ 30302-30303.

from seeking punitive damages under general maritime law.

The District Court denied the Motion to Strike because, notwithstanding *Miles*, the District Court concluded that it was bound by *Hines v. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987). *Hines* is an Eleventh Circuit decision that cites pre-*Miles* decisions to hold that seamen may recover punitive damages for employers willfully failing to pay maintenance and cure. *Hines* follows the pre-*Miles* decisions that create a punitive damages remedy based on the dissent in *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

Weeks Marine filed its Motion for Reconsideration of the Punitive Damages Order, or Alternatively, Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and Stay. The District Court denied Weeks Marine's request to reconsider its Punitive Damages Order, but granted the request for certification and stay pursuant to 28 U.S.C. § 1292(b). The pure question of law certified by the District Court is, "Whether punitive damages may be legally awarded in a case where maintenance and cure has been arbitrarily and willfully withheld from a seaman?"

The Eleventh Circuit granted Weeks Marine's Petition for Permission to Appeal Pursuant to Section 1292(b). On 23 August 2007, the Eleventh Circuit ignored *Miles*, reaffirmed *Hines*, and held that seamen may recover punitive damages in a maintenance and cure case. *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1285-86 (11th Cir. 2007).

On 11 September 2007, Weeks Marine filed a Petition for Rehearing En Banc. On 27 May 2008, the Eleventh Circuit denied Weeks Marine's request. Weeks Marine filed its Petition for Certiorari on 18 August 2008 and this Court granted the Petition on 3 November 2008.

## SUMMARY OF THE ARGUMENT

Mr. Townsend pursues remedies under the Jones Act and general maritime law. This appeal focuses on Mr. Townsend's claim for punitive damages, a non-pecuniary and a non-compensatory remedy, for the willful failure to pay maintenance and cure. The Eleventh Circuit erred when it ignored *Miles*, 498 U.S. 19, and reaffirmed prior precedent from that court allowing a seaman to recover punitive damages under general maritime law for the willful failure to pay maintenance and cure. *See Townsend*, 496 F.3d 1282; *Hines*, 820 F.2d 1187.

*Miles* controls because it instructs the lower courts to "be vigilant not to overstep the well-considered boundaries imposed by federal legislation" when determining what remedies are available to seamen. *Miles* confirms that the relevant "federal legislation" for seamen is the Jones Act and DOHSA. *Miles*, 498 U.S. at 29. Once the relevant statutes are identified, *Miles* requires uniformity between the statutes and any general maritime law remedies. *Miles*, 498 U.S. at 32-33. *Miles* holds that both the

Jones Act and DOHSA prohibit a seaman from recovering non-pecuniary damages. *Miles*, 498 U.S. at 31. Punitive damages are non-pecuniary damages. *Barnes*, 536 U.S. at 189; *Guevara*, 59 F.3d at 1506, n.7 (collecting cases). Consequently, as held by all post-*Miles* decisions that have analyzed this issue, *Miles* dictates that seamen may not recover punitive damages in a maintenance and cure case. *See Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007);[2] *Guevara*, 59 F.3d 1496; *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996).

## ARGUMENT

### I. Historical Context and Background

#### A. *The OSCEOLA* And *The IROQUOIS* Define The Remedies Available Under A Maintenance And Cure Claim

The first time that this Court recognized a seaman's general maritime law right to recover maintenance and cure was in *The OSCEOLA*, 189 U.S. 158 (1903). *The OSCEOLA* analyzed the Rules of Oleron,

[2] The Third Circuit "by tradition does not cite to its not precedential opinions as authority." Third Circuit Internal Operating Procedures Rule 5.7. *But see* Fed. R. App. P. 32.1 (stating that a "court may not prohibit or restrict the citation of federal judicial opinions . . . that have been . . . designated as . . . 'not precedent,' or the like; and . . . issued on or after January 1, 2007."

numerous foreign commercial codes, and case law decided by lower courts in the United States to determine the various rights available to seamen under general maritime law. *The OSCEOLA*, 189 U.S. at 169-75. The Court determined that "the law may be considered as settled" that seamen may not recover against their employer for injuries caused by the negligence of their fellow crewmembers, but could seek recovery for injuries caused by the unseaworthiness of the vessel. *The OSCEOLA*, 189 U.S. at 175. Additionally, *The OSCEOLA* confirms that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure. . . ." *The OSCEOLA*, 189 U.S. at 175.

The Court expanded the concept of maintenance and cure in *The IROQUOIS*, 194 U.S. 240, 247 (1904), by allowing the seaman to recover damages related to the master's failure to provide timely cure by "put[ting] into an intermediate port." Subsequent precedent confirms that *The IROQUOIS* allows seamen to recover "necessary expenses," but also "compensation for the hurt" if the failure to pay maintenance and cure causes or aggravates an illness. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932). Neither *The OSCEOLA* nor *The IROQUOIS* mentions anything beyond compensatory damages for the failure to pay maintenance and cure.

### B. *Vaughan v. Atkinson* Expands Maintenance And Cure To Include The Recovery Of Attorneys' Fees

In *Vaughan v. Atkinson*, 369 U.S. 527 (1962), the Court again analyzed what remedies a lower court may award in a maintenance and cure action. *Vaughan* addresses the issue of whether a seaman may recover the attorneys' fees expended to pursue a claim for maintenance and cure against an employer that "was callous in their attitude, making no investigation of [the seaman's] claim and by their silence neither admitting nor denying" whether the employer believed the seaman was entitled to receive maintenance and cure. *Vaughan*, 369 U.S. at 527. The majority opinion notes that the seaman "was forced to hire a lawyer to get what was plainly owed him" and concludes that "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." *Vaughan*, 369 U.S. at 531. *Vaughan* explains as follows:

> While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows . . . the recovery may also include 'necessary expenses.'

*Vaughan*, 369 U.S. at 530 (quoting *Cortes*, 287 U.S. at 371). Thus, the majority in *Vaughan* determines that seamen are entitled to recover their attorneys' fees as necessary expenses. *Vaughan*, 369 U.S. at 531.

The dissenting opinion in *Vaughan* argues that no basis exists for departing "from the well-established rule that counsel fees may not be recovered as compensatory damages," but "traditional concepts of the law of damages" would permit the jury to award "exemplary damages" for the employer's "wanton and intentional disregard" of a seaman's right to maintenance and cure that "would not necessarily be measured by the amount of counsel fees. . . ." *Vaughan*, 369 U.S. at 539-40. The dissent in *Vaughan* sowed the seeds of confusion that ultimately created the dispute currently pending before this Court.[3]

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[3] Why the *Vaughan* dissent created confusion regarding punitive damages is unclear. This Court has explained seven times that *Vaughan* represents one of the exceptions to the America Rule, nothing more. *See Summitt Valley Indus., Inc. v. Local 112*, 56 U.S. 717, 721 (1982); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Runyon v. McCrary*, 427 U.S. 160, 183 (1976); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258 (1975); *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). Courts that have reviewed this Court's precedent explaining *Vaughan* recognize that *Vaughan* does not permit punitive damages, but "stand[s] for the proposition that attorney's fees can be awarded to a prevailing party when his opponent has engaged in bad-faith conduct during litigation." *See Guevara*, 59 F.3d at 1502 (citing *Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226 (6th Cir. 1984) (tracing the citation history of *Vaughan*)).

### C. Confusion From *Vaughan* Leads The Eleventh Circuit To Conclude That Seamen May Recover Punitive Damages In A Maintenance And Cure Case

Relying on the *Vaughan* dissent's reference to "exemplary damages," the First Circuit Court of Appeals holds that a seaman can recover attorneys' fees and punitive damages for the willful failure to pay maintenance and cure. *See Robinson v. Pocahantas*, 477 F.2d 1048, 1051 (1st Cir. 1973). *Robinson* never addresses why it finds so much comfort in the dissent.

Five years later, the Second Circuit Court of Appeals rejected *Robinson's* expansive reading of *Vaughan* and declined to award punitive damages in a maintenance and cure case based on the actual holding in *Vaughan*. *See Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412 (2d Cir. 1978). Instead of relying upon the dissent's approval of "exemplary damages" in maintenance and cure cases, *Kraljic* notes that "the majority saw fit to go no further than . . . counsel fees" and thus, "[it] constrained to follow [the holding of *Vaughan*]." 575 F.2d at 416-17.

In 1981, the former Fifth Circuit Court of Appeals relied on *Vaughan*, *Robinson*, and other less relevant case law to hold that a seaman may recover punitive damages "when an employer has willfully violated the duty to furnish and maintain a seaworthy vessel." *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. Unit B 1981). After the

Eleventh Circuit Court of Appeals was created, the new Fifth Circuit relied upon *Vaughan*, *Robinson*, and *Merry Shipping* to hold that seamen are entitled to punitive damages under general maritime law for their employer's willful failure to pay maintenance and cure. *Holmes v. J. Ray McDermott Company*, 734 F.2d 1110, 1117-18 (5th Cir. 1987).

Neither *Robinson*, *Merry Shipping*, nor *Holmes* explain why those courts believed that a dissenting opinion authorized a lower court to create a new remedy not contemplated by the "settled" law referenced in prior Supreme Court opinions. *See Cortes*, 367 U.S. at 378; *The IROQUOIS*, 194 U.S. at 241-42; *The OSCEOLA*, 19 U.S. at 175. Other than acknowledging that *Vaughan* does not provide an answer and with only a perfunctory analysis of its own, the Eleventh Circuit followed *Merry Shipping* and *Holmes* in 1987 when it issued its cursory opinion in *Hines*. *Hines* allows a seaman to recover attorneys' fees and punitive damages for an employer's willful failure to pay maintenance and cure. *Hines*, 820 F.2d at 1188-89.

### D. *Miles* Clarifies Any Confusion Regarding The Ability Of Seamen To Recover Non-Pecuniary Damages

Notwithstanding any historical ambiguity regarding punitive damages in maintenance and cure cases, the question of a seaman's right to recover non-pecuniary damages was definitively resolved by

*Miles*, 498 U.S. 19. In *Miles*, the representative of a seaman's estate brought suit alleging Jones Act negligence and general maritime law unseaworthiness. *Miles*, 498 U.S. at 22. Here, the relevant question addressed by *Miles* is whether non-pecuniary damages for the loss of society are recoverable in a wrongful death action based on general maritime law unseaworthiness.

Before resolving that issue, *Miles* discusses at length the case of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne* created a general maritime wrongful death cause of action for two reasons: (1) to ensure consistency with the policy of the Jones Act and DOHSA and (2) to effectuate "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27.

The Court emphasizes *Moragne* in *Miles* because *Moragne* "exemplifies *the fundamental principles that guide [a] decision in [a seaman's] case.*" *Miles*, 498 U.S. at 27 (emphasis added). Specifically, *Moragne* recognizes that the Congressional enactment of the Jones Act and DOHSA indicate that "we no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death. . . ." *Miles*, 498 U.S. at 27. "[I]n this era, admiralty courts should look primarily to th[ose] legislative enactments for policy guidance." *Miles*, 498 U.S. at 27. Ultimately, "*Congress retains superior authority in these matters, and*

*an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. The [Congressional] statutes both direct and delimit [a court's] actions.*" *Miles*, 498 U.S. at 27 (emphasis added).

After recognizing the fundamental principles set forth in *Moragne*, the Court concludes that the "well-considered boundaries" of legal remedies available to seamen are set forth in DOHSA and the Jones Act. *Miles*, 498 U.S. at 31. The Court then notes that DOHSA specifically limits recoverable damages to "pecuniary loss sustained by the persons for whose benefit the suit is brought." *Miles*, 498 U.S. at 31 (citing 46 U.S.C. §§ 30302-30303). In analyzing the Jones Act, the Court confirms that the Jones Act does not provide for non-pecuniary remedies such as loss of society. Although the statute "does not explicitly limit damages to any particular form," the court reaches its conclusion by relying upon approximately one hundred years of jurisprudence to conclude that by "*[i]ncorporating the [Federal Employers' Liability Act ("FELA")] unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well.*" *Miles*, 498 U.S. at 32 (emphasis added) (citing *Michigan Centr. R. Co. v. Vreeland*, 227 U.S. 59 (1913)); *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 224 (1996) (confirming that *Miles* recognizes that the Jones Act, which "provides 'action for damages' to '[a]ny seaman who shall suffer personal injury,' permits *compensation only for pecuniary loss*") (emphasis added); *Pacific S.S. Co. v.*

*Peterson*, 278 U.S. 130, 138 (1928) (discussing "the right to recover compensatory damages under the new [Jones Act] rule for injuries caused by negligence . . . "); *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648, 656 (1915) (analyzing FELA and noting that plaintiffs may recover compensatory damages for personal injuries).

*Miles* "restore[s] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles*, 498 U.S. at 33. Because DOHSA and the Jones Act allow only for the recovery of pecuniary damages, *Miles* holds that "this explicit limitation forecloses recovery for non-pecuniary loss, such as loss of society, in a general maritime action." *Miles*, 498 U.S. at 31. *Miles* further explains the holding by noting that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. . . ." *Miles*, 498 U.S. at 32-33; *see also American Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994) (confirming that the Jones Act "establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seamen" and that courts must "harmonize" federal common lawmaking in admiralty with "the enactments of Congress in the field"); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (explaining that in an "area covered by the statute, it would

be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries").

## II. The Eleventh Circuit Committed Reversible Error By Ignoring *Miles* and Allowing Seamen To Recover More Expansive Remedies Than Those Sanctioned By Federal Statute

In *Townsend*, the Eleventh Circuit ignored *Miles'* detailed analysis of the "fundamental principles" that determine the remedies available for seamen and reaffirmed its prior decision in *Hines*. *Townsend*, 496 F.3d at 1286. The Eleventh Circuit rationalized that it was bound by the prior panel rule to follow *Hines* because this Court had not spoken to the specific issue before the Eleventh Circuit. *Townsend*, 496 F.3d at 1285-86. Simply put, even though *Miles* holds that seamen may not recover non-pecuniary damages, the Eleventh Circuit held (without further analysis) that it was bound by *Hines* because *Miles* did not specifically address the issue of punitive damages.

Every post-*Miles* circuit court decision other than *Townsend* confirms that *Miles* extends beyond its specific holding. In *Glynn v. Roy Al Boat Management Corporation*, 59 F.3d 1495, the Ninth Circuit held that seamen could not recover punitive damages in a maintenance and cure case because *Vaughan* never authorized the remedy and "limiting recovery to pecuniary damages [and prohibiting the recovery of

punitive damages] is consistent with *Miles*[']" admonishment of attempts to utilize general maritime law to expand the remedies offered to seamen beyond the controlling legislation (i.e., the Jones Act and DOHSA). *See also In re EXXON VALDEZ*, 270 F.3d 1215, 1226-27 (9th Cir. 2001) (noting that the Ninth Circuit holds that punitive damages are unavailable in a maintenance and cure case for a number of reasons, including recognition in *Glynn* that "under *Miles* . . . we were not free to expand seamen's remedies at will").

Less than one month after *Glynn* was decided, the Fifth Circuit went en banc to analyze whether *Miles* precludes seamen from recovering punitive damages in a maintenance and cure case. *Guevara*, 59 F.3d 1446. Applying *Miles*, the en banc Fifth Circuit held that punitive damages are not available in maintenance and cure actions. *Guevara* notes that "[a]fter *Miles*, it is clear that [pre-*Miles*] precedent . . . is no longer good law in light of the *Miles* uniformity principle because . . . the Jones Act damages limitations control" seamen's claims for punitive damages. *Guevara*, 59 F.3d at 1507.

The Third Circuit Court of Appeals is the most recent federal appellate court to address punitive damages in a maintenance and cure case. *See Kopacz*, 248 Fed. App'x 319. *Kopacz* joins *Glynn* and *Guevara* to hold that *Miles* precludes that remedy. *Kopacz* begins its review of the issue by noting that "the issue of punitive damages in admiralty cases has generally turned on an analysis of *Miles*. . . ." *Kopacz*, 248 Fed.

App'x at 323. *Kopacz* rejects the argument that *Miles* is distinguishable because it addresses a wrongful death action based on an unseaworthiness claim. The desire for uniformity expressed by *Miles* applies equally to maintenance and cure actions "because the failure to provide maintenance and cure is similar [to the unseaworthiness raised in *Miles* that is] a judicially created cause of action in which liability is without fault." *Kopacz*, 248 Fed. App'x at 323.

As *Miles* points out with words equally applicable to any cause of action permitted by general maritime law, "[i]t would be inconsistent with [a court's] place in the constitutional scheme were [it] to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *See Miles*, 498 U.S. at 32. The Third Circuit ends its analysis by "following the majority of courts" by recognizing that *Miles* precludes seamen from receiving punitive damages for the willful failure to pay maintenance and cure. *Kopacz*, 248 Fed. App'x at 323.

*Townsend* is wrongly decided. Although *Miles* may not directly address maintenance and cure claims, the uniformity principle articulated by *Miles* clearly applies. Indeed, *Miles* provides each legal conclusion that is necessary to correctly determine that seamen may not recover non-pecuniary damages such as punitive damages under general maritime law. *See Kopacz*, 248 Fed. App'x at 323; *Guevara*, 59 F.3d at 1507; *Glynn*, 57 F.3d at 1505. *Miles* explains

in detail that seamen are precluded from recovering more expansive remedies under general maritime law than those remedies permitted under the Jones Act and DOHSA. *Miles*, 498 U.S. at 23-33; *see also Higginbotham*, 436 U.S. at 625 (recognizing that in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries"). Moreover, *Miles* reconfirms that Congress limited the damages available under the Jones Act and DOHSA to pecuniary losses. *Miles*, 498 U.S. at 31-33; *see also Glynn*, 57 F.3d at 1502 (noting that *Miles* "assumed that the Congress intended to incorporate the pecuniary limitation on damages [that exists in FELA] into the Jones Act as well"); *Guevara*, 59 F.3d at 1507, n.9 (collecting numerous Supreme Court and circuit court decisions holding that a plaintiff may not recover non-pecuniary damages in personal injury or death claims under the Jones Act); *Peterson*, 278 U.S. at 138 (noting that Jones Act remedies are limited to compensatory damages); *Craft*, 237 U.S. at 656 (noting that FELA remedies are limited to compensatory damages).

Because punitive damages are non-compensatory and non-pecuniary in nature, no reason justifies the Eleventh Circuit's decision to ignore *Miles*. *See Barnes*, 536 U.S. at 189 (noting that "[p]unitive damages are not compensatory" damages); *Guevara*, 59 F.3d at 1506 (stating "[a]lthough the *Miles* Court did not mention punitive damages, they are rightfully

classified as non-pecuniary"); *Glynn*, 57 F.3d at 1505, n.14 ("Punitive damages are nonpecuniary damages.") (citing *Bergen v. F/V ST. PATRICK*, 816 F.3d 1345, 1347 (9th Cir. 1987)); *see also Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) ("'It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under [FELA].'" (quoting *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.), *cert. denied*, 510 U.S. 915 (1993))); *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1242, n.3 (6th Cir. 1971) (explaining that "[i]t is the general rule in this country that exemplary or punitive damages" are not permitted in statutes modeled after the Lord Campbell's Act such as FELA); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17, 18 (Tex. 1996) ("Punitive damages, like loss of society damages, are non-pecuniary losses and are not recoverable in Jones Act claims."). Therefore, Weeks Marine requests this Court to reverse *Townsend*, affirm *Glynn*, *Guevara*, and *Kopacz*, and hold that seamen may not recover punitive damages in a maintenance and cure case.

## III. Mr. Townsend's Previous Arguments For Ignoring *Miles* Are Without Merit

### A. Despite Attempts At Revisionist History, The Jones Act And Maintenance And Cure Overlap

At the Eleventh Circuit, Mr. Townsend asserted that *Miles* does not prohibit the recovery of punitive

damages because maintenance and cure "predate[d]" the Jones Act and provides a separate remedy that was unchanged by Congressional action. Mr. Townsend's Eleventh Circuit Initial Brief, pp. 5-8. Mr. Townsend argues that Congress knew that punitive damages existed as a potential remedy in a maintenance and cure case, but decided to not "fix something which isn't broken. . . ." Mr. Townsend's Eleventh Circuit Initial Brief, p. 6.

First, Mr. Townsend's argument includes an assumption not necessarily supported by the precedent that existed prior to Congress enacting the Jones Act. No Supreme Court decision decided prior to the passage of the Jones Act authorizes seamen to recover punitive damages in a maintenance and cure case. *See, e.g., The OSCEOLA*, 19 U.S. 158; *The IROQUOIS*, 194 U.S. 240. Even after the passage of the Jones Act, no pervasive body of case law existed that would allow one to conclude that Congress knew that seamen were entitled to recover punitive damages in a maintenance and cure case. *See, e.g., Kraljic*, 575 F.2d at 415 (emphasizing the novelty of seeking punitive damages by noting that the judge at the District Court level remarked, "In my seventeen years I haven't had a single plaintiff come in and ask for punitive damages for failure to pay maintenance and cure."). Therefore, the argument that Congress "left well enough alone" is unpersuasive. Mr. Townsend's Eleventh Circuit Initial Brief, p. 6.

More importantly, Mr. Townsend's argument fails because it ignores that this Court's precedent

recognizes that the Jones Act and maintenance and cure are not separate and are instead inextricably linked. *See Cortes*, 287 U.S. 367. *Cortes* confirms a clear relationship exists between general maritime law maintenance and cure claims and Jones Act negligence claims. Similar to *Miles*, *Cortes* concludes that there is an overlap between the two causes of action and that the Jones Act supplies the blueprint for the remedies that seamen may claim in a lawsuit.

In *Cortes*, a seaman's estate sought to recover for the wrongful death of the seaman allegedly caused by a failure to provide maintenance and cure. *Cortes*, 287 U.S. at 370. The employer in *Cortes* conceded that the Jones Act and maintenance and cure "overlapped" to the extent that both causes of action applied to personal injuries caused by the failure to pay maintenance and cure. However, with respect to wrongful death actions, the employer requested this Court to "give[] a narrow content" to the Jones Act and hold that the statute did not change general maritime law's bar on wrongful death claims. *Cortes*, 287 U.S. at 374.

The Court rejects the employer's argument noting that it "imputes to the lawmakers a subtlety of discrimination which they would probably disclaim." *Cortes*, 287 U.S. at 375. *Cortes* further explains as follows:

> Congress meant no more than this, that the duty must be legal, i.e., imposed by law; that it shall have been imposed for the benefit of

> the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail.

*Cortes*, 367 U.S. at 378. *Cortes* makes clear that seamen may pursue a claim for damages under the Jones Act if they suffer *injuries or death* as a result of the failure to pay maintenance and cure. *Cortes* does so by recognizing that causes of action arising under the Jones Act and general maritime law, whether for personal injury or death, overlap.[4]

The Fifth Circuit underscored the importance of the overlap between the Jones Act and maintenance and cure described in *Cortes* when it decided *Guevara*, 59 F.3d 1496. *Guevara* explains as follows:

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[4] The irony of attempting to avoid *Miles* by arguing that the Jones Act and maintenance and cure are separate and distinct causes of action should not be lost on this Court. In *Cortes*, the seaman's estate argued that the Jones Act and maintenance and cure overlapped so that the absence of a death remedy under general maritime law would not preclude the estate's wrongful death claim for the failure to provide maintenance and cure. Now, Mr. Townsend argues that the Jones Act and maintenance and cure do not overlap in an attempt to avoid the damage limitations required by the Jones Act.

> [T]he Supreme Court . . . indicated [in *Cortes* that] there are really two 'types' of maintenance and cure actions. The tort-like type involves a personal injury; i.e., typically a worsening of the seaman's physical or mental health caused by the failure to provide maintenance or, more likely, cure. The contract-like type need not involve a personal injury (although it may); it need only involve the loss of a monetary outlay. Because the tort-like maintenance and cure action involves a personal injury . . . it overlaps with the personal injury coverage of the Jones Act. . . .

*Guevara*, 59 F.3d at 1511-12 (citations omitted). *Guevara* concludes "once there is a statutory/general maritime law overlap in the factual circumstances that are covered, the *Miles* damages uniformity principle is invoked, and punitive damages would be precluded under the general maritime action for maintenance and cure."[5] *Guevara*, 59 F.3d at 1512; *Stone v. Int'l Marine Carriers, Inc.*, 918 P.2d 551, 556

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[5] "It is [also] noteworthy" that Congress amended the Jones Act to deny maintenance and cure to a particular class of seamen. *Guevara*, 59 F.3d at 1512, n.14; 46 U.S.C. § 30105(b). The amendment "indicates a congressional recognition that maintenance and cure actions are related to the Jones Act scheme" by stating that "'[n]o action may be maintained under [the Jones Act] or under any other maritime law of the United States *for maintenance and cure* or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States. . . .'" *Guevara*, 59 F.3d at 1512, n.14 (quoting 46 U.S.C. § 688(b)) (emphasis supplied by the court).

(Alaska 1996) (adopting *Guevara's* analysis of the overlap between the Jones Act and maintenance and cure and holding that seamen may not recover punitive damages in a maintenance and cure case); *Waiters*, 917 S.W.2d at 19 (same); *see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 6-34 (4th ed. 2004) (noting that "punitive damages are not available under the Jones Act" and explaining that the remedy is not available under general maritime law because the "tort-like action for maintenance and cure" overlaps with the Jones Act).

Moreover, any attempt to avoid *Miles* by arguing that the Jones Act is distinguishable because maintenance and cure is "primarily [a] contract-oriented claim" is equally without merit. *Guevara*, 59 F.3d at 1513. Pursuant to the argument, seamen could recover punitive damages for a contractual breach of the employer's duty to pay maintenance and cure, but they could not recover punitive damages if the failure to pay maintenance and cure exacerbated the seaman's injury or illness. The contract/tort distinction fails because "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract." *Barnes*, 536 U.S. at 187; *Guevara*, 59 F.3d at 1513 (rejecting the argument that the contract-like claim for maintenance and cure permits punitive damage because "[p]unitive damages . . . are generally unavailable for breach of contract" claims) (citing *Restatement (Second) of Contracts* § 355, at 154-56 (1979); 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1340, at

209-12 (3d ed. 1968); 5 Arthur Linton Corbin, *Corbin on Contracts* § 1077, at 437-39 (1964)); *Waiters*, 917 S.W.2d at 19 (same); *see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 6-34 (explaining no right exists for recovering punitive damages under the "contract-like" claim for failure to pay maintenance and cure because "punitive damages are generally not available" in contract-like actions).

Mr. Townsend also argued to the Eleventh Circuit that "[i]t is strained logic" to extend *Miles* to personal injury cases because the decisions addressing the issue are nothing more than "a collection of death cases." Mr. Townsend's Eleventh Circuit Initial Brief, pp. 11-12. Mr. Townsend seems willing to concede that *Miles* would preclude a seaman's estate from seeking punitive damages in a wrongful death case arising out of the failure to pay maintenance and cure. Nonetheless, Mr. Townsend believes that Congress intended to allow for different remedies in a personal injury case.

The argument fails whether analyzed through the lens of Supreme Court precedent or as a matter of public policy. This Court's recognition that "[i]t would be inconsistent with [a court's] place in the constitutional scheme" to allow more expansive remedies in a death case arising out of an unseaworthiness claim than one arising out of a negligence claim applies with equal force to an attempt to differentiate personal injury and death claims. *Miles*, 498 U.S. at 32. The plain words of the Jones Act confirm that Congress did not contemplate separate and distinct

causes of action. Rather, in the Jones Act, the death action flows directly from the underlying injury. *See* 46 U.S.C. § 30104 (a "seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law against . . . the employer"). Consequently, "admiralty court[s] must be vigilant not to overstep the well-considered boundaries imposed by federal legislation" that "both direct and delimit [a court's] actions." *Miles*, 498 U.S. at 27; *see also Kopacz*, 248 Fed. App'x at 323; *Guevara*, 59 F.3d at 1507.

Furthermore, this Court rebuked Mr. Townsend's argument in *Cortes*. Like Mr. Townsend, the employer in *Cortes* attempted to convince this Court that Congress intended different remedies for personal injury and wrongful death claims covered by the Jones Act. *Cortes*, 287 U.S. at 374. The Court rejected the argument and assumed that Congress would "disclaim" any suggestion that the legislation intended to differentiate between remedies for torts that cause injury and for torts that cause an injury that results in death. *Cortes*, 287 U.S. at 375. *Cortes'* recognition that Congress did not distinguish between personal injury and death remedies confirms that "actions under the general maritime law for *personal injury* are also subject to the *Miles* uniformity principle, as non-fatal actions for personal injury to a seaman are covered by statute – i.e., the Jones Act." *Guevara*, 59 F.3d at 1506 (emphasis in original); *see also Lollie v. Brown Serv., Inc.*, 995 F.2d 1565

(11th Cir. 1993) (utilizing the *Miles* uniformity principle to preclude a seaman's spouse from recovering loss of society and loss of consortium damages in a *personal injury* lawsuit); *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (agreeing "with the Fifth Circuit's reading of *Miles*" and holding that a seaman's spouse may not recover loss of society damages in a *personal injury* lawsuit); *Murray v. Anthony J. Bertucci Constr. Co., Inc.*, 958 F.2d 127 (5th Cir.), *cert. denied*, 506 U.S. 865 (1992) (stating that the "reasoning [of *Miles*] applies with equal force to a seaman's claim for injuries" and holding that spouses may not recover loss of society damages in a *personal injury* lawsuit); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992) (utilizing the *Miles* uniformity principle to preclude seamen from recovering loss of consortium damages in a *personal injury* lawsuit).

As a matter of public policy, distinguishing between actions for personal injuries and death creates remedies disproportionate to the negligence underlying the action. No justification exists for allowing punitive damages for personal injuries arising out of the willful failure to pay maintenance and cure, but prohibiting those same damages for more reprehensible conduct that causes the death of a seaman.[6] *See, e.g., Chan v. Society Expeditions, Inc.*,

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[6] Similarly, deciding legal rights based on policy concerns spawned by an outdated stereotype that seamen are "wards of admiralty" is wrong. The correct analysis for determining whether a seaman can recover punitive damages starts with and

(Continued on following page)

39 F.3d 1398, 1407-08 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995) (noting that the argument to ignore *Miles* and allow more expansive remedies in a personal injury lawsuit for passengers "makes no sense" because that "would effectively reward a tortfeasor for killing, rather than merely injuring his victim").

### B. Mr. Townsend's "Parade of Horribles" Is Unfounded

Mr. Townsend warns that a decision that follows *Miles* and prohibits punitive damages will incentivize employers to arbitrarily withhold maintenance and cure from seamen. *See* Mr. Townsend's Brief In Opposition to the Petition for Writ of Certiorari, p. 13; Mr. Townsend's Eleventh Circuit Initial Brief, pp. 22-24. Weeks Marine questions whether any empirical evidence supports the prediction that plaintiffs' attorneys will refuse to litigate claims that allow for the recovery of attorneys' fees. Furthermore, Weeks Marine asserts that sufficient deterrents exist in the absence of punitive damages.

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ends with the Jones Act. *See Miles*, 498 U.S. at 37 ("We are not unmindful of [the wards of admiralty] principles, but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand the remedies at will simply because it might work to the benefit of seamen. . . .").

Courts recognize that "'there [are three levels of] an escalating scale of liability'" for the employer in a maintenance and cure case. *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 177 (5th Cir. 2005), *cert. denied*, 549 U.S. 952 (2006) (quoting *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987)). If the employer has been reasonable in denying liability, then the employer is liable only for the amount of maintenance and cure. *See Brown*, 410 F.3d at 177. Second, if the court finds that the employer has refused to pay without a reasonable defense, then the employer also becomes liable for compensatory damages. *See Brown*, 410 F.3d at 177. Third, if the employer not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, then the employer becomes liable for attorneys' fees in addition to compensatory damages. *See Brown*, 410 F.3d at 177. Therefore, beyond the employer's desire to "do the right thing," general maritime law motivates employers to properly compensate seamen by threatening the employer with any consequential damages resulting from the aggravation of the injury and with attorneys' fees. *See Glynn*, 57 F.3d at 1504 (reasoning that "by allowing attorney's fees contrary to the normal American rule, *Vaughan* provides seamen with an appropriate remedy for the 'necessary expenses' and damages caused by a willful and persistent failure to pay what is due: hiring a lawyer, filing suit, and incurring legal expenses on top of expenses for their own maintenance and cure").

Last, Mr. Townsend attacks Weeks Marine's request to apply the *Miles* uniformity principle by arguing that if the Court "followed [the *Miles* uniformity principle] to its logical conclusion, there would be no more duty to provide maintenance and cure at all." Mr. Townsend's Eleventh Circuit Initial Brief, p. 21. Mr. Townsend fails to recognize the purpose of the *Miles* uniformity principle. *Miles* reinforces that "[m]aritime tort law is now dominated by federal statute, and [courts] are not free to expand *remedies* at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles*, 498 U.S. at 36 (emphasis added). *Miles* does not limit causes of action or sound the "death knell" for maintenance and cure. Mr. Townsend's Eleventh Circuit Initial Brief, p. 21. In the end, *Miles* only addresses the need for courts to operate within the "constitutional scheme" by ensuring that Congress, not the courts, authorizes the remedies that seamen may seek in a lawsuit. *Miles*, 498 U.S. at 32; *DoCarmo v. F.V. Pilgrim I Corp.*, 612 F.2d 11, 13, n.3 (1st Cir.), *cert. denied*, 446 U.S. 956 (1980) (stating that "courts have . . . consistently confined Jones Act damage award to pecuniary loss[,]" and that "arguments concerning any injustice alleged to be perpetrated by this rule should properly be addressed to Congress").

## CONCLUSION

The Court should reverse the Eleventh Circuit's decision and hold that seamen may not recover punitive damages in a maintenance and cure case as a matter of law.

Respectfully submitted,

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# RESPONDENT'S BRIEF

Supreme Court, U.S.
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No. 08-214

# In The
# Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

v.

EDGAR L. TOWNSEND,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENT'S BRIEF ON THE MERITS

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[1] *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995).

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## SUMMARY OF THE ARGUMENT

The method of enforcing the ancient right of a seaman to receive medical care from the seaman's employer falls within this Court's jurisdiction as a common law court of last review. The Respondent asserts that both attorney's fees and punitive damages are necessary to enforce the right, and to harmonize the common law right of seamen to maintenance and cure with the statutory remedies enacted by Congress in the Longshore and Harbor Workers' Compensation Act, the Seaman's Wage Act, and the Railroad Unemployment Insurance Act. While those statutes are not directed toward seamen, the policy behind them can provide guidance to the Court.

Congress has never expressed an intent to limit damages in non-fatal maritime accidents to pecuniary losses. The extension of the "pecuniary damages" limitation contained in the Death on the High Seas Act to non-fatal injuries is a misapplication of that Act, and the Jones Act. It violates the rule of construction that statutes enacted for the benefit of seamen are to be liberally construed to expand the available remedies. More importantly, it distorts the intent of Congress in passing the legislation.

Finally, since maintenance and cure is a common law remedy, the Court is free to construct a remedial scheme to assure that maintenance and cure is provided to seamen with a minimum of judicial intervention. The Respondent proposes a three-tiered

approach. First, where a seaman prevails in a contested claim for medical care against the shipowner, the seaman should recover attorney's fees as compensatory damages. Second, where the denial of medical care is negligent, and produces an injury or disability that would not have arisen if appropriate care had been given, the seaman should recover damages for injuries which are proximately caused by the denial of needed care. Third, where a shipowner withholds medical care with the intent of causing pain, disability, or injury, or as part of a scheme or plan to punish seamen who file claims, hire attorneys, or bring lawsuits, the seaman should recover punitive damages sufficient to both punish the shipowner, and to deter other shipowners from engaging in similar conduct.

## ARGUMENT

### I. Historical Context and Background

#### A. The right to maintenance and cure is one of ancient origin, existing as part of the maritime common law. Neither *The Osceola* nor *The Iroquois* addresses the issue before this Court: how to enforce the right in the face of a willful, intentional, and callous denial of medical care.

The "uniformity principle" articulated in *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990) applies

in situations where there are "well-considered boundaries imposed by federal legislation." Such well-considered boundaries exist in the case of deaths that occur on the high seas, beyond the three mile limit, where the damages recoverable by dependents of decedents are limited by the Death on the High Seas Act to "pecuniary damages." Where there are no such boundaries, "maritime law . . . falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2619 (2008). Maintenance and cure falls in this latter category.

The Petitioner confidently asserts that "punitive damages are non-pecuniary damages." The Respondent disagrees. This Court has defined "pecuniary damages" as follows:

> A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, "not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." [citation omitted]

> Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

*Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 71 (1913).

Significant is the fact that nowhere does this Court's definition of "pecuniary damages" mention punitive damages or categorize punitive damages as non-pecuniary. From the context of the definition it can be concluded that the categories "pecuniary" and "non-pecuniary" refer to types of compensatory damages and that punitive damages, which are designed to punish rather than to compensate, are in a different category. That category is properly called "exemplary damages."

In land-based law, punitive damages are not created by statute, but instead are based upon "a well-established principle of the common law"[2] both in England before the founding of the United States, and in American courts thereafter. The courts permitted punitive damages in tort cases that involved "aggravated misconduct or lawless acts," including

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[2] *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851).

those resulting from gross negligence, or intentional torts, such as battery, trespass, slander and libel. Any conduct which displayed a degree of "moral turpitude or atrocity of the defendant's conduct" could be the subject of punitive damages, which were assessed at "the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."[3]

The earliest discussion of punitive damages, and particularly the use of punitive damages as an indirect means of awarding counsel fees and litigation expenses, arose out of a case involving damage intentionally caused to a dam in Great Barrington, Massachusetts in the 1840s. Horace Day was a New York resident who erected a mill dam across the Housatonic River. Berkshire Woolen Company owned a number of wool-producing mills further upriver, and the operation of Mr. Day's mill impeded the operation of the Berkshire Woolen mills. Rather than resort to the courts, Berkshire Woolen directed twenty-five of its employees to go to Day's mill and knock a portion of it down, which they did. Of the 112 foot long dam, they knocked down a portion 54 feet in length.

In the lawsuit that followed, Day sued the twenty-five Berkshire Woolen employees individually. The jury found that the damages to Day's dam could be fixed for a mere $200, but awarded a total of $1000, apparently to compensate Day for the attorney's fees

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[3] *Day, supra note 1*, at 371.

and expert witness fees of an engineer, which Day had to expend to bring the case to trial. The trial judge thought the award was excessive, advised the jury that Day would recover his "taxable costs" as the winning party, and sent the jury back into deliberations to reconsider its verdict. During the later deliberation the jury reduced their award of damages to $200. Little did the jury know that under the "American Rule" the term "taxable costs" did not include attorney's fees, and that in the U.S. system of justice "the legal taxed costs are far below the real expenses incurred by the litigant."[4] Consequently, while Day was awarded $200, the likelihood is that the cost of the litigation exceeded the amount of his recovery.[5]

The Supreme Court affirmed the decision limiting Day's damages to $200, finding that state legislatures had "so much reduced attorney's fee-bills" and had refused to permit a shifting of attorney's fees from the winning to the losing party, that a jury was not authorized to increase its award of damages to account for fees and costs. The Supreme Court also noted that it was "the practice of the courts of admiralty to include in their verdict, in certain cases, a

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[4] *Day, supra note 1*, at 372.

[5] In its discussion of the inherent power of the courts to punish parties for vexatious litigation, the Supreme Court authorized treble damages stating "if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it." *Id.*, at 372.

sum sufficient to indemnify the plaintiff for counsel-fees and other real or supposed expenses over and above taxed costs." Since admiralty law is a body of common law, this was permissible. *Day*, *supra*, at 372. However, it acknowledged that in cases decided under state law, punitive damages were sometimes awarded as an indirect means of compensating an injured plaintiff for the expenses of bringing a suit, but counseled that those damages were intended for another purpose – to punish conduct which was the result of "malice, wantonness, [or] oppression." As intended, punitive damages expressed a jury's "outrage of the defendant's conduct [and] the punishment of his delinquency."

In maritime law punitive damages have also been an historically available remedy to punish shipowner misconduct. In a 1997 article Professor David Robertson of the University of Texas School of Law catalogued twenty-five significant maritime cases decided between 1790 and 1851 where the trier of fact discussed punitive damages as a remedy available in maritime law.[6] While only four of those cases actually awarded punitive damages, the cases "contain judicial *dicta* or other indications that the maritime law of the period regarded punitive damages as unexceptional."[7]

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[6] David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997).

[7] *Id.* at 88.

Consequently, while *The Osceola* and *The Iroquois* recognized that maintenance and cure is the common law enactment of ancient remedies codified in the Rules of Oleron, which have gained acceptance worldwide, neither of those cases provide this Court with guidance on how to resolve the issue before the Court. The question in this case is whether the historically available remedy of punitive damages can be imposed to punish a shipowner who willfully withholds medical care from an injured seaman.

### B. *Vaughan v. Atkinson* recognized that admiralty courts have equitable powers and can award attorney's fees in addition to maintenance and cure in order to make the seaman whole. The issue of punitive damages for the willful failure to pay maintenance and cure was not raised in the lower courts in *Vaughan*, and hence was not before the Supreme Court when *Vaughan* was decided.

In Justice Stewart's dissent in *Vaughan v. Atkinson*, 369 U.S. 527, 540 (1962) he stated "if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages." The majority never commented on the availability of punitive damages to enforce the shipowner's duty to provide maintenance and cure because the issue was not before the Court.

Neither the district court nor the Fourth Circuit which heard the *Vaughan* case had the issue of punitive damages raised by the seaman's counsel. The district court recognized that awarding solely the amount of unpaid maintenance and cure, without an allowance for attorney's fees, would leave the injured seaman with only 50% of what he was entitled to, because the cost of hiring an attorney in a maintenance and cure case resulted in counsel fees being half of the total award.[8] If the seaman still required medical care, such as a surgery, an award of 100% of the cost of the surgery, reduced by 50% for counsel fees resulted in the seaman being unable to obtain the needed surgery.

In the Fourth Circuit the majority understood the unfortunate result, but felt unable to remedy the inequity.[9] Since the issue of punitive damages was not before the Court in *Vaughan*, it is not accurate to say that "the dissent in *Vaughan* sowed the seeds of confusion that ultimately created the dispute currently pending before this Court" because the district court in *Vaughan* on remand,[10] and the Eleventh

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[8] The Trial Court found that "the evidence does show, and the Court finds that libelant was required to pay one-half of the amount recovered by way of maintenance to his proctor. This is undoubtedly a diminution of the total amount which should have been paid to libelant . . . " *Vaughan v. Atkinson*, 200 F. Supp. 802, 804 (E.D. Va. 1960).

[9] *Vaughan v. Atkinson*, 291 F.2d 813, 815 (4th Cir. 1961).

[10] *Vaughan v. Atkinson*, 206 F. Supp. 575, 576 (E.D. Va. 1962):

(Continued on following page)

Circuit in *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987)[11] both understood that the Supreme Court had not been presented with the issue, and hence had not decided the question of whether punitive damages, in addition to attorney's fees, could be awarded.

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> As this court interprets the language of the Supreme Court, the intent and purpose of the same is that the trial court should make the seaman "whole", i.e., he should not be required to pay money out of his pocket to collect maintenance lawfully due to him. To accomplish this fact, the respondents are required to pay, by way of damages, a reasonable attorney's fee to libelant's proctor for prosecuting the proceedings made necessary to collect the seaman's maintenance claim.

[11] *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987):

> *Vaughan* is not dispositive because in that case only a claim for attorney's fees was asserted, not separate claims for both fees and punitive damages.

### C. The Eleventh Circuit was not confused by *Vaughan* into recognizing a right to claim punitive damages for the willful failure to pay maintenance and cure. Rather, between 1959 (*Vaughan*) and 1990 (*Miles*), a consensus was emerging in the Circuits that both attorney's fees and punitive damages could be awarded, both to make the seaman whole, and to deter misconduct by shipowners.

While the First Circuit was the initial Circuit Court to hold that punitive damages could be awarded for the willful and wanton failure to provide maintenance and cure,[12] historically it was the Fifth Circuit that, twenty-two years after *Vaughan*, most aggressively supported the award of punitive damages in maritime law for the willful and wanton misconduct of a shipowner. As that Court said in *In re Complaint of Merry Shipping*, 650 F.2d 622, 625-626 (5th Cir. 1981), citing Prosser, The Law of Torts § 2, at 9 (1971):

> Punitive damages, long established in our legal system, may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. They serve the purpose of punishing the defendant, of teaching him not to do it again, and

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[12] *Robinson v. Pocohantas, Inc.*, 477 F.2d 1048 (1st Cir. 1973).

> of deterring others from following his example . . . We therefore hold that in this Circuit punitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner.

Three years later the Fifth Circuit extended its ruling in *Merry Shipping* and awarded punitive damages to a seaman in a case involving the willful and wanton failure of a shipowner to provide maintenance and cure. *See Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984) (" . . . it is clear that the $11,550 award was purely punitive in nature, serving both as a deterrent and as a punishment, and did not include any such [attorney's] fees.") and *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984). The Eleventh Circuit followed with *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187 (11th Cir. 1987) (" . . . it seems clear that even if exemplary in nature, attorney's fees, if fixed reasonably to cover only a proper fee award, would not foreclose the punitive purpose of a punitive damage award. We follow the reasoning of the Fifth Circuit and hold that both reasonable attorney's fees and punitive damages may be legally awarded in a proper case.") The Ninth Circuit continued the trend in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) ("Punitive damages serve the purposes 'of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.' These purposes support their availability in general maritime law and the trend is to allow such recoveries.").

The Second Circuit was of the opinion that both the majority and minority in *Vaughan* believed that punitive damages were warranted in that case, but also that the Court's decision not to award them, and to award attorney's fees instead, reflected a considered choice between the two options. Instead, the decision to award attorney's fees was an application of the doctrine that the Court will not entertain claims for relief which have not been raised in the lower courts. *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 415-416 (2d Cir. 1978) ("The [First Circuit] court [of Appeals in *Pocohantas*], we believe, correctly perceived that both majority and minority opinions in [*Vaughan v.*] *Atkinson* in essence found that punitive damages were awardable in maintenance and cure cases . . . Yet the majority saw fit to go no further than to allow punitive damages limited to counsel fees.").

Contrary to the argument of the Petitioner, there was no confusion after *Vaughan*. The historical development of the law in the Circuits after *Vaughan* shows a growing consensus that punitive damages are appropriate in cases where a shipowner willfully and wantonly denies maintenance and cure to an injured seaman. The only remaining question was whether punitive damages and attorney's fees could be awarded.

**D. The real confusion began with the Fifth Circuit's interpretation of *Miles v. Apex Shipping* in *Guevara v. Maritime Overseas Corp.*[13] which extended the uniform wrongful death remedy in *Miles* to cases involving living seamen. The *Miles* decision correctly established a uniform maritime wrongful death remedy. However, the extension of *Miles* by the Fifth Circuit outside of the context of wrongful death, and into the area of non-fatal injuries, has sewn confusion in the maritime law.**

There is no legislative support in the United States or England, for the proposition that either Congress or the House of Lords has expressed a policy of barring the recovery of non-pecuniary damages in cases with non-fatal injuries. Death is universal. Eventually all persons will suffer the "inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Personal injuries are unique in the sense that most persons can go through life without experiencing personal injuries caused by the negligence of another. For that reason, damages for wrongful death and damages for personal injuries have always been treated differently

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[13] *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995).

in the law. This principle is illustrated by the 1808 English case of *Baker v. Bolton.*[14]

In *Baker v. Bolton*, Baker and his wife were on top of a stagecoach that overturned. Baker was bruised but he survived. His wife lived for about a month but subsequently died from her injuries. Baker sued for non-pecuniary damages including "the comfort, fellowship, and assistance of his said wife" (loss of society) and his "great grief, vexation, and anguish of mind" over her death (mental anguish). The court divided the damages into those accruing before death, and those accruing after, permitting the recovery of both pecuniary and non-pecuniary damages which arose during Mrs. Baker's one month convalescence, but denying further damages arising after her death. The House of Lords said:

> [T]he jury could only take into consideration the bruises which the plaintiff [Mr. Baker] had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution [death]. In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence.

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[14] *Baker v. Bolton*, 170 Eng. Rep. 1033, 1 Camp 493 (Nisi Prius 1808).

The court awarded Mr. Baker pecuniary damages for his bruises, and non-pecuniary damages for the loss of the society of his wife for the one month prior to her death, and his mental anguish during her last month.[15] The important thing to recognize is that historically, at common law, non-pecuniary damages were available in non-fatal accidents. They were only barred upon the occurrence of a fatality.

In 1846, England adopted the Fatal Accidents Act of 1846[16] which expanded the remedies available in death cases and granted dependents of decedents killed due to the negligence of a third party the right to recover damages "proportional to the injury." Since

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[15] The amount of the award was of £100.

[16] Fatal Accidents Act of 1846, 9 and 10 Vict. c. 93. The Act provides:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding such death, etc.
>
> Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and *in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively* for whom and for whose benefit such action shall be brought [Emphasis supplied].

the Act had been proposed by Lord Campbell, who introduced it and steered it through the Commons, it became known as Lord Campbell's Act, the first wrongful death act in English jurisprudence. It arose out of the increasing number of railroad deaths occurring in England in the mid-1800s and a conclusion that the common law, which cut off remedies for personal injury upon the death of the victim of negligence, was outdated.

How does Lord Campbell's Act, an English law dating back to 1846, relate to punitive damages in a maintenance and cure case involving non-fatal injuries which is brought by a living seaman in the 21st Century? It doesn't. The application of the pecuniary damage limitation in wrongful death suits to cases involving living seamen claiming a right to medical care could never have been predicted by either Congress or Parliament, because Lord Campbell's Act applies only to fatal injuries and never mentions pecuniary damages, non-pecuniary damages or punitive damages. Its only instruction regarding damages is that "the jury may give such damages [for wrongful death] as they may think proportioned to the injury."

Despite the fact that Lord Campbell's Act is neither U.S. law, nor a maritime act, it has become an important part of the myth that there is a "uniform plan of maritime tort law" extending to both wrongful death cases, and cases brought by living seamen, which excludes punitive damages. To come to the conclusion that Congress has intentionally restricted

punitive damages in maritime law, one must make three large leaps of logic: first, that Congress intended for the wrongful death remedy in the FELA to be interpreted using decisions of the House of Lords; second, that Congress intended the logic of the House of Lords in death cases to be applied to non-fatal personal injury cases involving railway workers; and third, that Congress believed that punitive damages were a type of compensatory remedy which could be classified under the loose definition of "non-pecuniary damages." None of those conclusions will stand up to close scrutiny.

The Employers' Liability Act of 1908, which has become known as the Federal Employers' Liability Act, or "FELA,"[17] preceded The Merchant Marine Act of 1920[18] by twelve years. FELA gave railroad workers the right to sue their employers for personal injury or wrongful death. However, FELA never

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[17] 45 U.S.C. § 51 does not limit damages to "pecuniary damages" but instead provides that "every common carrier by railroad . . . shall be liable in damages. . . ." It states:

> Every common carrier by railroad . . . *shall be liable in damages* to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence . . . or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment [Emphasis supplied].

[18] 46 U.S.C. §§ 30104-30105, formerly 46 U.S.C. § 688.

mentions a measure of damages for wrongful death. The measure of damages in wrongful death cases, which the courts crafted to "fill the gap," was to limit recovery in FELA death cases to a loosely defined category called "pecuniary damages." Pecuniary damages included pain and suffering, but excluded loss of society. They included loss of support but excluded loss of future income of the decedent. However, the subject of punitive damages was simply not part of Congressional consideration when FELA was passed, or court consideration when it "filled the gap."

When Congress drafted the Jones Act it gave seamen the same cause of action against shipowners that railway workers had against railroads. However between the passage of FELA and the Jones Act, the Supreme Court implied that wrongful death damages in the death of a railway worker were to be limited to pecuniary damages, just as they were under the House of Lords' interpretation of Lord Campbell's Act.

The Supreme Court, in engrafting the words "pecuniary damages" upon FELA acknowledged that neither Congress nor Parliament had placed the word "pecuniary" in either Lord Campbell's Act or the FELA. However, because "the former act [Lord Campbell's Act] and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage" in wrongful death cases, the same would be true in FELA

wrongful death cases.[19] In other words, insertion of the words "pecuniary damages" in place of "such damages as [a jury] may think proportioned to the injury" is unsupported by the words of a legislative body. Since Congress did not limit damages to pecuniary losses only, and particularly did not do so in the case of non-fatal injuries to railway workers, the court should respect the will of Congress as expressed in the FELA, and impose no such limits on damages under the Act.

Efforts to suggest that Congressional acts intended to benefit seamen preempt maintenance and cure have been made and rejected since at least the 1820's. In *Harden v. Gordon*, 11 F. Cas. 480, 484 (U.S. Court of Appeals 1823), a shipowner confronted Justice Story, whose compassion for seamen was legendary, with the argument that the passage of a statute by Congress requiring shipowners to provide for a medicine chest to be kept aboard ship preempted a seaman's right to maintenance and cure. Justice Story dismissed the argument as follows:

> In the construction of statutes it is a general rule, that merely affirmative words do not vary the antecedent laws or rights of parties. There must be something inconsistent with or repugnant to them, to draw after a statute an implied repeal, either in whole or *pro tanto* of former laws; otherwise the statute is

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[19] *Michigan C. R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913).

> supposed to be merely declarative or cumulative. . . .

Justice Story found that since the obligation to provide a medicine chest aboard ship was not inconsistent with the obligation to provide maintenance and cure, the passage of the statute did not impliedly repeal or modify the obligation of the shipowner to provide medical care, but instead created an additional obligation to have a medicine chest onboard so that medical treatment could be provided promptly, without having to await arrival at the next port of call.

Using Justice Story's early formulation of the preemption doctrine in a maritime case, the Jones Act was meant by Congress to be a cumulative remedy, and not to supplant the common law remedy of maintenance and cure, because the Jones Act is neither repugnant to the policies behind maintenance and cure, nor is it inconsistent with the common law. For over two centuries the doctrine of maintenance and cure has been judicially crafted and enforced with only minor Congressional supplementation or interference.[20] Congress has demonstrated an intent "to leave well enough alone" and to permit the courts to regulate the requirements of maintenance and cure.

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[20] The only reference to maintenance and cure in the United States Code is found in 46 U.S.C. § 30105(b) (formerly 46 U.S.C. § 688(b)). That section limits the right of aliens injured in the offshore oil drilling industry in foreign territorial waters to seek redress in U.S. courts.

The rationale for most of the modern decisions which depart from that principle, and disapprove of the award of punitive damages for the wrongful denial of maintenance and cure, stems from a misinterpretation of *Miles v. Apex Marine*. The Circuit Courts have either incorrectly assumed that punitive damages are not available in maintenance and cure cases because their use was preempted by the passage of the Death on the High Seas Act[21] and the Jones Act in 1920.

In this case, the shipowner is arguing that Congress, in enacting The Merchant Marine Act of 1920,[22] commonly known as the "Jones Act," granting seamen a right of action against their employers for personal injuries caused by negligence, took from this Court its authority to award punitive damages in egregious cases in order to deter violations of the duty to provide medical care. There is nothing in the Act or its history which supports that position.[23] The Act was intended to further the treatment of seamen as a protected class, and to afford them additional

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[21] 46 U.S.C. §§ 30302-30303.

[22] Merchant Marine Act of 1920, § 19 and § 27, 46 App. U.S.C. § 876 and § 883 et seq.

[23] If that were Congress' intent, one would have thought that it would have been discovered sometime in the 75 years between when the Act was passed in 1920, and when the non-pecuniary damage limitation was first extended to non-fatal injury cases in 1995. When that leap of logic was made, Congressman Jones had been dead for 63 years.

remedies to assure that they are cared for by shipowners if injured in the service of the ship.[24]

The Jones Act[25] was pushed through Congress in the closing two days of Congress[26] without debate and

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[24] Shortly after its passage the Supreme Court acknowledged the Jones Act to be cumulative with other seamen's remedies, and not to supplant them. In *Bainbridge v. Merchants & Miners Transp. Co.*, 287 U.S. 278, 282 (1932) the Court stated:

> The Jones Act, being an addition to the Seamen's Act, was intended to be consistent with the spirit of that legislation, which was directed to promote the welfare of American seamen. We agree with that view. . . . Seamen have always been regarded as wards of the admiralty and their rights, wrongs and injuries a special subject of the admiralty jurisdiction. . . . The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class. . . . In the light of and to effectuate that policy, statutes enacted for their benefit should be liberally construed [Citations omitted].

This rule of statutory construction is applicable in this matter. The Jones Act should be interpreted to enhance seamen's remedies, not to contract them to the point where a seaman has fewer remedies than a similarly situated person who is injured ashore.

[25] The Jones Act is named for U.S. Senator Wesley L. Jones (1863-1932), a Republican from Yakima, Washington who served as Chairman of the Commerce Committee from 1919 to 1930. While seamen should be grateful for the Jones Act, it is worth noting that while he was a lawyer, he never lived near the ocean, or a navigable river, and his practice never included maritime law.

[26] "[Jones] *Urges U.S. to Fight for American Ships,*" NEW YORK TIMES, June 20, 1920.

President Woodrow Wilson signed it into law on June 5, 1920.[27] Congress left no legislative history relevant to the issue of protection of seamen, but news reports commenting on the Jones Act show that it was enacted as part of an overall plan to develop the United States merchant marine.[28] It was drafted to protect American seamen, and to appeal to foreign merchant seamen to come to the United States for better benefits and more protection than that which was offered under foreign maritime laws.[29] As Senator Jones stated, "every word, every line, every section was written solely in the interest of the United States."[30]

In the absence of legislative history one can surmise the intent of Congress in passing both the Jones Act and the Death on the High Seas Act was affected by the results of the 1912 sinking of the RMS Titanic. That disaster brought to light two points of

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[27] RENE DE LA PEDRAJA, A HISTORICAL DICTIONARY OF THE U.S. MERCHANT MARINE AND SHIPPING INDUSTRY (Greenwood Publ'g Group 1994).

[28] Admiral W.S. Benson, "The purpose of the Congress in enacting the Merchant Marine Act of 1920 was to give American ships 'national' advantage in our trades with foreign countries." NEW YORK TIMES, *"What Our Sea Carriers Are Doing and Can Do; Status of America's Merchant Marine Since the War and Need for Encouragement in Peace,"* NEW YORK TIMES REVIEW OF BOOKS, June 20, 1920.

[29] "[Lawyer for seaman's union] *Declares Foreign Sailors Desert to Seek Better Pay Here,"* NEW YORK TIMES, July 9, 1920.

[30] *"Jones Defends Ship Legislation,"* NEW YORK TIMES, December 11, 1920.

law. The first was the dependents of seamen and passengers who died on the high seas were only entitled to recover for the value of the decedents' lost baggage. The second was that while seamen could recover damages caused by the unseaworthiness of a vessel, damages caused by the negligence of the crew, such as in running into an iceberg, were not recoverable. One can surmise that Congress saw the injustice in permitting seamen to sue for unseaworthiness, but not negligence, and used the passage of the Merchant Marine Act of 1920 to correct that perceived injustice. One can also surmise that neither Senator Jones, nor the Senators and Congressmen who voted for the Act ever considered the possibility that voting for a bill that did not mention maintenance and cure, pecuniary damages, or punitive damages, would somehow be interpreted over 80 years later to usurp from the courts' their longstanding and historical right to enforce the obligation of maintenance and cure by awarding punitive damages for the willful failure to provide medical care.

This Court has counseled lower courts against using the Jones Act to narrow maritime remedies by analogy. In *American Export Lines v. Alvez*, 446 U.S. 274, 283-284 (U.S. 1980) the Court stated:

> . . . the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law . . . Thus, a remedial omission in the Jones Act is not evidence of considered

> congressional policymaking that should command our adherence in analogous contexts. And we have already indicated that "no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any non-statutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.

For the decade between the *American Export* case and *Miles*, lower courts exercised the restraint which this Court counseled. However, since this Court's decision in *Miles*, lower courts have permitted the guidance provided by *American Export* to go ignored. The limitations on non-pecuniary[31] damages in maritime wrongful death cases occurring on the high seas have now "jumped the rails" to include non-death cases involving injuries to non-seamen such as cruise ship passengers and recreational boaters; such limitations also include accidents happening on territorial waters, as opposed to the high seas. These are areas which Congress demonstrated no intent to

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[31] "Among the impediments to such discussion [of policy issues regarding punitive damages in maritime law] have been the courts' evident misunderstanding of the history of maritime punitive damages and the temptation to stop thinking once someone points out that punitive damages are 'non-pecuniary.'" David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 164 (1997). Professor Robertson's scholarly writings on punitive damages in maritime law support Respondent's position that non-pecuniary damages are a subset of compensatory damages intended to describe claims for loss of society and mental anguish, and that punitive damages fall into the separate classification of "exemplary damages." *Id.* 80-83.

regulate by passage of either the Jones Act or the Death on the High Seas Act.[32]

Where the decision in *Miles* "jumped the tracks" is described by the Fifth Circuit in *Guevara, supra*, 1506-1507, where that Court took the *Miles* logic one step further than either Congress in enacting the Jones Act, or this Court in rendering the decision in *Miles,* intended:

> Taking the analysis one step further, it should be clear that actions under the general maritime law for personal injury are also subject to the *Miles* uniformity principle, as non-fatal actions for personal injury to a seaman are covered by statute – i.e., the Jones Act. Thus, many courts [in the Fifth Circuit] have extended *Miles's* logic to prohibit the recovery of certain damages in personal injury factual settings that are covered by statute, even when these personal injury claims are brought under the general maritime law. *See, e.g., Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 131-32 (5th Cir. [1992]) (applying the principles of *Miles* to preclude an injured seaman's spouse from recovering loss of society damages under the general maritime law), *cert. denied*, 121

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[32] According to one noted commentator, "In this vein, some courts have taken upon themselves the agenda of tort reform despite the fact that Congress itself has not seen fit to do so." Robert Force, *The Legacy of Miles v. Apex Marine Corporation*, 30 Tul. Mar. L. J. 35, 36 (2006).

> L. Ed. 2d 134, 113 S. Ct. 190 (1992); *Michel v. Total Transp., Inc.*, 957 F.2d 186, 191 (5th Cir. 1992) (applying *Miles* to a personal injury claim by a seaman and holding that "damages recoverable in general maritime causes of action for personal injury of a Jones Act seaman do not include loss of consortium").

Indeed, in *Murray*, *Michel*, and *Guevara*, the Fifth Circuit failed to follow this Court's guidance in *American Export Lines v. Alvez* that the Jones Act and DOHSA are not to "be accorded overwhelming analogical weight in formulating remedies under general maritime law." We are primarily concerned in this case with the decision in *Guevara*.

It makes no more sense to limit remedies in non-fatal maritime cases to pecuniary damages, than it does to limit damages in land-based common law tort cases to the remedies available under a state's wrongful death act. Neither DOHSA nor state wrongful death acts are evidence of legislative intent to limit damages in non-fatal accident cases.

## II. The Eleventh Circuit properly found that maintenance and cure was within the federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagreed with the judicial result. History has committed enforcement of the obligation to provide maintenance and cure to the discretion of the courts, and Congress has studiously avoided legislating in the field.

It is a basic rule of statutory construction that in order to abrogate a common law principle, a statute must speak directly to the question addressed by the common law.[33] The Eleventh Circuit in *Townsend* correctly found that neither the Jones Act, nor the Death on the High Seas Act speak directly to the remedies available for the willful and wanton denial of maintenance and cure to a seaman. It refused to make the same mistake that the *Guevara* court made, and imply into the Jones Act and DOHSA an intent by Congress to exclude non-pecuniary damages from non-fatal cases arising under maritime law, an intent which cannot be discerned from either Act.

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[33] This is essentially a restatement of the rule of statutory construction set out by Justice Story in *Harden*, *supra*, and reiterated in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984); *United States v. Texas*, 507 U.S. 529, 534, 113 S. Ct. 1631, 123 L. Ed. 2d 245 (1993); and *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).

**III. The Fifth Circuit Court has taken *Miles* out of context and changed the maritime common law in ways which were unintended and unforeseeable. *Miles* decided that where Congress has ruled, the Courts are not free to re-write those rules. The reverse is also true. Where Congress has avoided ruling, courts should refrain from implying Congressional intent to limit remedies where no such intent can be discerned from Congressional actions. It is up to the Court to select a system of remedies which will permit the doctrine of maintenance and cure to operate without frequent resort to the courts.**

The Respondent proposes that the Court establish a three-tiered approach to the enforcement of the shipowner's obligation to provided maintenance and cure. First, in cases where medical care is wrongfully withheld from a seaman, the seaman should recover attorney's fees. This should be true even if the shipowner's decision to withhold care was not under circumstances deserving of punishment. Attorney's fees are compensatory, not punitive, and without the recovery of attorney's fees a seaman can never be made whole because most or all of the seaman's recovery will be consumed by fees and costs, and the seaman will be deprived of the medical care needed. It should continue to be an exception to the American Rule, predicated upon the recognition that equity demands a seaman be made whole.

It is best to examine this first proposal in a practical example. Assume that a seaman required rotator cuff surgery as a result of a shipboard accident. With surgery, he will eventually return to work. Without surgery, he will not be able to return to work. Further assume that rotator cuff surgery costs about $15,000 in 2009. If the seaman is required to hire an attorney on an hourly basis at $150 per hour, and hire an expert at a cost of $1500 to testify that he needs rotator cuff surgery and that such a surgery will cost $15,000, then upon prevailing in the claim the seaman may recover $15,000 a year after the injury, but only net $6000, which is not enough to obtain the needed surgery. The seaman will never get back to work, and the shipowner will have little incentive to err on the side of the seaman.

Secondly, where a shipowner's failure to provide maintenance and cure results in the seaman suffering an increased level of disability or other personal injuries, a cause of action should exist for recovery for the additional injuries under the Jones Act, either under principles of negligence or intentional tort, depending upon the circumstances. This principle is already recognized under the law. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-139 (1928).

The third tier deals with those rare instances of actual misconduct.[34] Such misconduct would include situations where withholding maintenance and cure is done as part of an unwritten corporate policy, or as part of a common plan, scheme or design to inflict pain and disability upon injured seamen to "send a message" to other seamen not to employ counsel, or to compel a settlement of personal injury litigation as a means to ease the discomfort of disability. It may be difficult to believe that shipowners would engage in such activities, but the relationship between seaman and shipowner has always been one where overreaching is possible.

The Ninth Circuit takes the approach that attorney's fees alone is an adequate incentive. In *Glynn v. Roy Al Boat Management Company*, 57 F.3d 1495 (9th Cir. 1995) it says:

> [T]he threat of liability for attorney's fees adequately serves to deter recalcitrance, as they would likely exceed interim maintenance and cure and the use of money which

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[34] The position of the Eleventh Circuit, even after the Fifth Circuit's decision in *Guevara*, was that punitive damages were still recoverable in maritime cases in "exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman . . . and in those very rare situations of intentional wrongdoing." *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot v. Warrior & Gulf Navigation Company*, 121 F.3d 1421, 1429 (11th Cir. 1997), *cert. den.*, 522 U.S. 1110, 118 S. Ct. 1041, 140 L. Ed. 2d 106 (1998). Consequently this conflict between the Circuits has existed for over ten years.

> would otherwise have paid it. Punitive damages, in addition to attorney's fees, are thus not needed to provide a powerful incentive for shipowners to investigate and pay promptly.

However, experience proves that there are some shipowners which do not consider the award of attorney's fees against them to be an adequate incentive. Therefore, where a shipowner intentionally, callously, and willfully withholds medical care from a seaman the shipowner has committed a separate and distinct tort, equivalent to battery, and punitive damages are warranted. Just as pulling the chair from under a person about to sit down results in the natural sequence of events to the person striking the ground, and just as feeding poison to a person results in the natural sequence of events to the person getting ill, intentionally withholding medical care from an injured seaman will, in the natural sequence of events, cause the seaman pain at best, and physical injury at worst. It is a tort, and it is one which, with an appropriate level of culpability, warrants the award of punitive damages.

This three-tiered approach finds approval in statutory enactments which can be analogized to maintenance and cure. As mentioned earlier, maintenance and cure is perhaps the earliest form of workers' compensation. Congress has left maintenance and cure in the panoply of the maritime common law, but in analogous areas, such as the Longshore and Harbor Workers Compensation Act (LHWCA), the

Seaman's Wage Statute, and the Railroad Unemployment Insurance Act ("RUIA"), 45 U.S.C. § 352, Congress has extensively legislated and left a blueprint which may guide the Court's actions in this case.

The first tier of the three-tiered approach is supported by Section 928[35] of the LHWCA which provides a longshoreman or harbor worker who successfully pursues a claim for medical care or indemnity the right to recover attorney's fees, even in the absence of any misconduct by the employer. Support for the second tier is found in Section 908 which requires an employer to pay benefits based upon the employee's level of disability. If medical care is withheld, and the disability worsens, the level of compensation increases. The third-tier is supported by Section 905(a). Where an employer fails to secure compensation and medical care, or takes action "with the intent to avoid the payment of compensation" the corporation can be charged with a crime. The President, Secretary, and Treasurer of the corporation may be imprisoned for a period of up to one year, and can

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[35] 33 U.S.C. § 928. Fees for services

(a) Attorney's fee; successful prosecution of claim

If the employer or carrier declines to pay any compensation . . . on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier . . .

be held individually liable both for the payment of compensation, and for any fines assessed. Further, the employee may pursue an action at law, or in admiralty, in which neither contributory negligence, assumption of the risk, or actions of a fellow servant may be raised by an employer.[36] These penalties imposed by Congress are punitive and inure to the benefit of the injured longshoreman.

Congress established a system similar to maintenance and cure for railroad workers in 1937 in the Railroad Unemployment Insurance Act.[37] The Act provides for the payment of sickness benefits without a showing of negligence on the part of the employer, and in 45 U.S.C.A. §§ 359 establishes criminal penalties of up to $1000 and one year in jail for any violation of the provision of the Act.

In both the LHWCA and the RUIA Congress has empowered administrative agencies, the Department of Labor in the former, and the Railroad Retirement Board in the latter, and delegated to them the obligation of enforcing the rights of the employees, monitoring the obligations of the employer, and imposing punishment on employers who fail to fulfill their obligation under the respective Acts. Congress has apparently foreseen a problem with committing similar responsibilities to an administrative agency

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[36] *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967) provides Judge John R. Brown's analysis of the remedies available to longshoremen.

[37] 45 U.S.C. §§ 351-367.

that protects seaman's rights because it is both unnecessary and impractical. It is unnecessary because the maritime common law doctrine of maintenance and cure has worked for over two centuries in the United States under the supervision of the courts, and has existed worldwide for over a thousand years. Moreover, no United States based administrative agency could effectively monitor the medical care of seamen who travel the world and whose employers may or may not be located in the United States. The obligation to enforce the shipowner's duty to provide maintenance and cure rests with the courts.

Finally, in the Seaman's Wage Act, 46 U.S.C. § 10313, Congress has enacted a punitive remedy where a seaman may recover two days of wages for each day that the seaman's wages are delayed. Such a remedy is undoubtedly punitive in effect, if not in intent. *See Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982).

*Amicus Curiae* for the Cruise Lines International Association expresses concern that if punitive damages are available its members may find themselves responsible for paying punitive damages for making simple mistakes in failing to provide medical care. A brief look at the list of cases cited in the briefs in this case show that cruise ship operators are conspicuous in punitive damage cases only by their absence. Perhaps it is the nature of the hospitality industry to treat their employees with care, in the hopes that the employees will treat their passengers similarly. However, the concerns of the cruise industry are unfounded because punitive damages are appropriate

only against those shipowners who act odiously toward their employees. Historically cruise ship operators have not fallen in that category.

These three Acts, when considered together, answer the question of the intent of Congress. Were Congress asked what it would do to an employer which intentionally withholds medical care from an injured seaman, it would undoubtedly answer that it would punish the employer. This Court should do no less.

## CONCLUSION

The decisions of the district court and of the Eleventh Circuit,[38] were correct, and both attorney's fees and punitive damages may be awarded by a court for the intentional withholding of medical care from an injured seaman.

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[38] *Atlantic Sounding Co. v. Townsend*, No. 3:05-CV-649, 2006 WL 4702150 (M.D. Fla. April 20, 2006).

# REPLY BRIEF

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# In The Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

v.

EDGAR L. TOWNSEND,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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## SUMMARY OF THE ARGUMENT

Weeks Marine's position rests on two unassailable principles: (1) *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), confirms that seamen may not recover damages under general maritime law that are inconsistent with the damages available under the Jones Act and the DOHSA and (2) the Jones Act and the DOHSA limit damages for seamen to no more than the recovery of pecuniary damages and pain and suffering. Adhering to these principles, all circuit courts addressing *Miles* hold that *Miles* prevents the recovery of punitive damages in a maintenance and cure case as a matter of law. *See Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1046 (1996).

Mr. Townsend's response necessarily asks this Court to overrule these principles and precedent. First, Mr. Townsend suggests that the substantial body of law rejecting punitive damages in Jones Act and DOHSA cases is wrongly decided. Congress, however, has had ample opportunity to "correct" the long-settled precedent holding that the DOHSA, the Jones Act and its predecessor, the FELA, do not permit the recovery of punitive damages. Yet, Congress has never amended the statutes to allow for the damages claimed by Mr. Townsend. Mr. Townsend should address his arguments to Congress, not this

Court. *See, e.g., Miles*, 498 U.S. at 32 (reasoning that Congress affirmed this Court's pecuniary limitation on seamen's damages because Congress passed the Jones Act after this Court decided *Michigan Centr. R.R. Co. v. Vreeland*, 227 U.S. 59 (1913)).

After his unsuccessful attack on the long-standing precedent precluding the recovery of punitive damages under the governing statutes, Mr. Townsend then fails to distinguish *Miles*. Mr. Townsend suggests that *Miles* and its progeny concern only wrongful death remedies. But, as shown below, this argument fails to justify allowing greater damages in an injury case and ignores precedent that requires consistent damages for seamen in injury and death cases. Mr. Townsend and his amici also resort to word play in attempting to avoid the reasoning of *Miles*. Regardless of how Mr. Townsend defines "pecuniary damages," the conclusion remains that the Jones Act and DOHSA do not permit the recovery of punitive damages because they are not compensatory damages, pecuniary losses, or pain and suffering.

Mr. Townsend's and his amici's reliance upon *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), is also misplaced. *Baker* addresses the remedies under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, not the Jones Act. In sharp contrast to the seven decades of precedent under the Jones Act holding that punitive damages are unavailable, *Baker* wrote on a clean slate with respect to the CWA.

Finally, Mr. Townsend supports his attempt to overrule long-settled precedent by marshalling policy arguments in favor of punitive damages. Mr. Townsend resorts to the ancient presumption that seamen are "wards of admiralty." This Court holds in *Miles* itself that this presumption cannot overcome the principle that Congress, not the courts, determines the damages available to seamen. Mr. Townsend also argues that, without punitive damages, plaintiffs' attorneys will not represent seamen. Mr. Townsend fails to offer any proof for his hypothesis.

## ARGUMENT

### I. *Miles* Requires Uniformity Between The Damages Recoverable Under The Jones Act, The DOHSA, And General Maritime Law

*Miles* emphasizes that the primary source of a maritime plaintiff's remedies is no longer the general maritime law. Instead, a seaman's death damages are controlled and limited by the damages permitted by the Jones Act (incorporating the FELA) and the DOHSA: pecuniary losses in the wrongful death action and a limited remedy in the survival action for a seaman's pre-death pain and suffering. *Miles*, 498 U.S. 19; *see also Dooley v. Korean Airlines Co., Ltd.*, 524 U.S. 116 (1998); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996); *Mobil Oil Corp. v. Higginbotham*, 43 U.S. 618 (1978); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

In analyzing the estate's request for loss of society damages in its wrongful death claim, *Miles* denies the request because recovery under the Jones Act (and DOHSA) is strictly limited to "pecuniary loss." *Miles*, 498 U.S. at 32. *Miles'* holding is consistent with an established line of precedent recognizing that recovery under the FELA and the Jones Act "is limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss." *Gulf, Colorado and Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 175-76 (1913) (citing *Vreeland*, 227 U.S. at 68-69; *American R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149 (1913)); *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648 (1915); *see also Dooley*, 524 U.S. at 122 (DOHSA limits damages to "compensation for the pecuniary loss"); *Zicherman*, 516 U.S. at 231 (same).

*Miles'* focus on pecuniary losses is not surprising when one considers that every Supreme Court decision preceding *Miles* described the FELA as limited to the recovery of compensatory damages. *Craft*, 237 U.S. at 656 (FELA "invests the injured employe[e] with a right to such damages as will compensate him for his personal loss and suffering"); *McGinnis*, 228 U.S. at 175-76 (stating FELA recovery is "limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss"); *Vreeland*, 227 U.S. at 68-69 (noting that if the seaman "had survived he might have recovered such damages as would have

compensated him for his expense, loss of time, suffering, and diminished earning power"); *Didricksen*, 227 U.S. at 149 (clarifying that the "damage[s recoverable in a FELA death action are] limited strictly to financial loss thus sustained").[1]

Punitive damages are not pecuniary damages. *See, e.g., In re Amtrack "Sunset Limited" Train Crash in Bayou Canot, Alabama*, 121 F.3d 1421 (11th Cir. 1997). Punitive damages are not compensatory damages. *See Baker*, 128 S. Ct. at 2620-21; *Barnes v. Gorman*, 536 U.S. 188 (2002). "'Compensatory damages and punitive damages . . . serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered. . . . The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrong doing.'" *Baker*, 128 S. Ct. at 2633, n. 27 (quoting *Cooper*

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[1] *See also Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 136-39 (1928). *Peterson* addresses the question of whether an *injured* seaman may recover damages under the Jones Act for negligence and maintenance, cure, and unearned wages to the end of the voyage. In deciding that a seaman may concurrently seek recovery for both claims, *Peterson* states nine times that seamen are entitled to "compensatory damages" under the Jones Act. *Peterson*, 278 U.S. at 136-39. *Peterson* also refers to the recovery under the statute as a "right to indemnity." *Peterson*, 278 U.S. at 138. Like the concept of compensatory damages (compensating the injured party for the injury sustained and nothing more), the concept of indemnity (agreeing to reimburse an individual *for a loss*) has nothing to do with punitive damages.

*Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)).

Because punitive damages do not compensate for pecuniary losses, courts have historically recognized that the FELA and the Jones Act do not allow for the recovery of punitive damages in injury or death cases. *See, e.g., Kopacz*, 248 Fed. App'x 319; *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 201-03 (1st Cir. 1994) (prohibiting a seaman from recovering punitive damages in an unseaworthiness injury case because "it has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under [the FELA]")[2]; *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 510 U.S. 915 (1993) (following the guidance of the Jones Act and the DOHSA by prohibiting the recovery of punitive damages in an unseaworthiness death case); *Glynn*, 57 F.3d 1495; *Guevara*, 59 F.3d 1496; *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392 (9th Cir. 1987) (prohibiting the recovery of punitive damages in a personal injury FELA case);

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[2] The First Circuit's decision in *Horsley* undermines Mr. Townsend's reliance upon *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973), and decisions that adopted *Robinson's* analysis. *Horsley* essentially overrules *Robinson* because it recognizes (like all other post *Miles*' decisions) that the FELA and the Jones Act do not permit the recovery of punitive damages and that *Miles* requires consistent damages under the Jones Act and general maritime law. *Horsley's* affect on *Robinson* confirms that the Eleventh Circuit is the only circuit court that has ignored *Miles*.

*Bergen v. F/V ST. PATRICK*, 816 F.3d 1345, 1347 (9th Cir. 1987) (prohibiting the recovery of punitive damages in a seaman's wrongful death case because "[p]unitive damages are non-pecuniary damages unavailable under the Jones Act [or DOHSA]"); *Kozar v. Chesapeake and Ohio Ry. Co.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971) (prohibiting the recovery of punitive damages in a FELA death case because of the "clear, unambiguous statements in the line of Supreme Court authorities holding that damages recoverable under [the FELA] are compensatory only"); *Kopczynski v. The JACQUELINE*, 742 F.2d 555, 560-61 (9th Cir. 1984) (prohibiting the recovery of punitive damages in a Jones Act personal injury case and stating that any "argument that [punitive damages] should be available ought to be addressed to Congress"); *see also Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996); *Stone v. Int'l Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993); *State ex rel. Burlington N., Inc. v. District Court of Eighth Judicial District, in and for County of Cascade*, 548 P.2d 1390 (Mont. 1976); *O'Gara v. Cedar Rapids and Iowa City Ry. Co.*, No. C00-0076, 2001 WL 34148161 (N.D. Iowa Sept. 13, 2001); *Gray v. Lockheed Aeronautical Systems Co.*, 880 F. Supp. 1559 (N.D. Ga. 1995); *In re Mardoc Asbestos Case Clusters 1, 2, 5, and 6*, 768 F. Supp. 595 (E.D. Mich. 1991); *Toscano v. Burlington N. R.R. Co.*, 678 F. Supp. 1477 (D. Mont. 1987); *Mahan v. Metro-North Commuter R.R.*, No. 86CIV0922, 1987 WL 7937 (S.D.N.Y.

March 9, 1987); *Cain v. Southern Ry. Co.*, 199 F. 211 (E.D. Tenn. 1911).

Thus, as all the circuits addressing this question in light of *Miles* have observed, *Miles* dictates that seamen may not recover punitive damages under any cause of action, including the failure to pay maintenance and cure. *See also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-34 (4th ed. 2004) (stating that because "punitive damages are not available under the Jones Act, the principle of uniformity precludes them under even a tort-like action for maintenance and cure"). *Miles* demands uniformity with the Jones Act and the DOHSA. Neither statute permits the recovery of punitive damages.

## II. Mr. Townsend Ignores Congress' Affirmation Of More Than Seven Decades Of Precedent Holding That The FELA And The Jones Act Do Not Permit The Recovery Of Punitive Damages

Mr. Townsend attempts to argue around decisions holding that the Jones Act limits recovery to "pecuniary damages" or "compensatory damages" by criticizing the opinions as a "large leap of logic." *Miles*, 498 U.S. at 32; Mr. Townsend's Merits Brief at p. 18. Despite Mr. Townsend's criticism and the ink spilled in attempting to divine that seamen *may* have recovered punitive damages in earlier, lower court cases, exhaustive research by Mr. Townsend and his amici fail to reveal *any* cases that hold a plaintiff may

recover punitive damages in a FELA or Jones Act case. The absence of punitive damages cases in this area of law has been commented on by other courts. *See Kozar*, 449 F.2d at 1240-43 (stating "there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed"); *In re Mardoc Asbestos Case Clusters*, 768 F. Supp. at 597 (emphasizing that the plaintiffs failed to "cite even a single Jones Act case in which punitive damages were permitted" and acknowledged that the "weight of authority is against such recovery [of punitive damages] in view of the judicially imposed pecuniary loss limitation on compensatory damages recoverable under the Jones Act").

The inability to locate any "on point" precedent to support what Mr. Townsend describes as a "historically available remedy" suggests a contrary conclusion. Attorneys and courts have known for decades that nothing within the ancient maritime codes summarized by this Court in *The OSCEOLA*,[3] nothing within the FELA, and nothing within the Jones Act permit the recovery of punitive damages for seamen. A unanimous string of decisions that begins

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[3] This Court emphasizes the limitations that *The OSCEOLA*, 189 U.S. 158 (1903), placed on recoverable damages for seamen in *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). *Chelentis* makes clear that the damages seamen could recover from their employer prior to the Jones Act were no more than pain and suffering and "the cost of cure and maintenance." *See Warner v. Goltra*, 293 U.S. 155, 159 (1934) (explaining the holding of *Chelentis*).

almost immediately after Congress enacted the FELA holds that neither the FELA nor the Jones Act permit the recovery of punitive damages. *See* Section I above. Persuasive "hornbook law" recognized as early as 1935 that "the [FELA] denies . . . recovery [of punitive damages]." McCormick, *Handbook on the Law of Damages*, § 81 (West Publishing Co. 1935); *Vaughan v. Atkinson*, 369 U.S. 527, 540 (1962) (citing to McCormick when discussing punitive damages in the context of maintenance and cure, but failing to analyze the preclusive effect of the Jones Act as explained by *Miles*).

Congress has never expressed its disapproval of the decisions that disallow the recovery of punitive damages under the FELA and the Jones Act. Congress' inaction is not for lack of opportunity. Congress was "aware" of this Court's decisions that deny recovery beyond pecuniary damages in a FELA case, but did nothing to address that issue when it enacted the Jones Act.[4] *See Miles*, 498 U.S. at 32 (noting that when "Congress passed the Jones Act, the *Vreeland* gloss on FELA . . . was well established" and "Congress must have intended to incorporate the pecuniary limitations on damages"). Congress amended the

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[4] As explained in *Warner*, Congress enacted the Jones Act to avoid the damages limitations on seamen's claims that were reiterated in *Chelentis*. *Warner*, 293 U.S. at 158-59. Consequently, the historical context of the passage of the Jones Act suggests that Congress was acutely aware of the affect of this Court's interpretation of recoverable damages for a worker covered by federal statute when it passed the Jones Act.

FELA in 1939 and the Jones Act in 1982. Nothing within those amendments addresses the "hornbook law" that punitive damages are precluded by the FELA.

Congress amended the Jones Act as recently as 2006 and 2008 without attempting to insert a punitive damages remedy into the statute. This congressional inaction is in the face of multiple circuit court decisions in the last decade that have followed the reasoning of *Miles* to preclude the recovery of punitive damages and other non-pecuniary damages in a variety of contexts involving seamen. *See Miller*, 989 F.2d 1450; *Horsley*, 15 F.3d 200; *Lollie v. Brown Serv., Inc.*, 995 F.2d 1565 (11th Cir. 1993); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992); *Murray v. Anthony J. Bertucci Constr., Inc.*, 958 F.2d 127 (5th Cir.), *cert. denied*, 506 U.S. 865 (1992); *Guevara*, 59 F.3d 1496; *Glynn*, 57 F.3d 1495.

Congress' failure to disturb a consistent judicial interpretation of a statute provides some indication that "Congress at least acquiesces in, and apparently affirms, that [interpretation]." *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979); *see also Miles*, 498 U.S. at 32 (stating that this Court "assume[s] that Congress is aware of existing law when it passes legislation"). As in *Miles*, this Court should refuse Mr. Townsend's overtures to allow punitive damages in view of Congress' inaction on the issue. *See Miles*, 498 U.S. at 32; *Horsley*, 15 F.3d at 201, 203 (relying on congressional silence regarding the courts' consistent interpretation of the FELA and the Jones Act to determine that the reasoning of *Miles* precludes the

recovery of punitive damages for seamen); *Kopczynski*, 742 F.2d at 561 (holding that seamen may not recover punitive damages in a personal injury case and stating that any "argument that they should be available ought to be addressed to Congress"); *Padilla v. Consolidated Rail Corp.*, 463 N.Y.S.2d 1000, 1001 (N.Y. Sup. Ct. 1983) (stating that Congress' "silence over the years both in the statute [and the] legislative history on the subject of damages theory can only be viewed as foreclosing any basis for punitive damages").

## III. Mr. Townsend Fails To Distinguish *Miles*

### A. *Miles* Applies With Equal Force To Personal Injury And Death Damages

Recognizing the difficulty of discrediting one hundred years of precedent rejecting the recovery of punitive damages under the Jones Act, the FELA and the DOHSA, Mr. Townsend attempts to partially avoid *Miles*. Mr. Townsend suggests that this Court should analyze death and injury damages differently under *Miles*. *See* Mr. Townsend's Merits Brief at pp. 14-28. In addition to the stark conflict that Mr. Townsend's request creates with *Miles*, Mr. Townsend's proposed "disuniformity principle" fails for several other reasons.

The text of the Jones Act indicates that Congress intended harmony between claims for injury and death by utilizing language that closely linked claims for the two types of actions. The Jones Act provides a

claim for "a seaman injured in the course of his employment or, *if the seaman dies from that injury*." 46 U.S.C. § 30104 (emphasis added). Furthermore, 46 U.S.C. § 30105 recognizes the interrelationship of a seaman's personal injury and death causes of action. *See* 46 U.S.C. § 30105 (preventing certain foreign seaman from recovering under the Jones Act in a "civil action for maintenance and cure or *for damages for personal injury or death*. . . ." 46 U.S.C. § 30105(b) (emphasis added). The text of the Jones Act contradicts the argument that Congress intended for disparate remedies for personal injury and death.

*Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), further contradicts Mr. Townsend's argument. Like Mr. Townsend, the employer in *Cortes* requested disparate damages for injury and death. *Cortes* rejects the request stating that it "imputes to the lawmakers a subtlety of discrimination which they would probably disclaim." *Cortes*, 287 U.S. at 375-76; *see also Zicherman*, 516 U.S. at 224 (citing to *Miles* in noting that the Jones Act is a statute that "permits compensation only for pecuniary loss" for any "seaman who shall suffer personal injury"); *Miles*, 498 U.S. at 36 (recognizing the Jones Act as "Congress' ordered system of recovery for *seamen's injury and death*") (emphasis added); *see also Miller*, 989 F.2d at 1458 (noting that the court would not "irrigate what has been called the 'Serbonian bog' that is the law relating to a seaman's recovery for death and

injury" by allowing for punitive damages under general maritime law, but not the Jones Act).

Mr. Townsend's suggestion that this Court create an "anomaly" by applying a different rule to personal injury and death claims also contravenes *Moragne v. States Marine Lines*, 398 U.S. 375. In *Moragne*, this Court addresses the need for a general maritime law wrongful death action in the context of correcting three "anomalies in maritime law." 398 U.S. at 395-96. One of the anomalies included the fact that the general maritime law unseaworthiness doctrine allowed a claim for personal injury arising in state territorial waters, but not for deaths. *Moragne*, 398 U.S. at 395-96; *Miles*, 498 U.S. at 26. *Moragne* corrected that anomaly (and the others) by recognizing a general maritime law wrongful death cause of action. Now, Mr. Townsend seeks to reintroduce an inconsistency in injury and death cases contrary to *Moragne*. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281 (1980) (holding that whether a non-seaman is injured or dies is irrelevant to authorizing the recovery of loss of society under general maritime law).[5]

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[5] Mr. Townsend also cites to *Alvez* for the proposition that it is not appropriate to use the Jones Act to restrict the scope of available maritime remedies. *See* Mr. Townsend's Merits Brief at pp. 25-26. However, *Alvez* is a case addressing longshoremen damages and is inapposite to the business at hand. Seamen and longshoremen are mutually exclusive categories. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 356-57 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 US. 337, 347 (1991).

Last, Mr. Townsend's request to differentiate injury and death damages for the failure to pay maintenance and cure simply does not make sense. As noted in Weeks Marine's Merits Brief, no justification exists for allowing punitive damages in a case involving injury, but not in a case that involves the death of a seaman. *See, e.g., Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1407-08 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995) (noting that the argument to ignore *Miles* and allow more expansive remedies in a personal injury lawsuit for passengers "makes no sense" because that "would effectively reward a tortfeasor for killing, rather than merely injuring his victim").

### B. Regardless Of The Semantics Employed By Mr. Townsend, The Jones Act Does Not Allow For The Recovery Of Punitive Damages

Mr. Townsend's third attempt to avoid *Miles* is pure semantics based on a misuse of the word "pecuniary." Mr. Townsend utilizes the following syllogism to avoid *Miles*: *Miles* states that the Jones Act does not allow for the recovery of non-pecuniary damages; punitive damages are not non-pecuniary damages; therefore, *Miles* allows the recovery of punitive damages. *See* Mr. Townsend's Merits Brief at pp. 3-4. The fallacy in Mr. Townsend's argument stems from his misstatement of *Miles* in his initial premise. *Miles* holds that the seaman's estate in a wrongful death action can recover damages only for pecuniary losses

(e.g., loss of support, loss of services). *Miles* does not hold that the estate can recover any type of damage that is not non-pecuniary. Simply put, *Miles* restricts the recovery of the estate in a Jones Act death action to the recovery of pecuniary damages, i.e., compensatory damages. Punitive damages are not pecuniary (or compensatory) damages and are unrecoverable under the Jones Act.

Again playing with words, Mr. Townsend also suggests that *Miles* permits "non-pecuniary" damages because *Miles* allows for pain and suffering damages in survival claims. *See* Mr. Townsend's Merits Brief at p. 20. This argument misses the point. It is entirely academic whether pain and suffering damages are characterized as pecuniary or non-pecuniary. The clear point is that all of the damages recoverable under *Miles* are designed to compensate the plaintiff for his or her loss. In other words, *Miles* makes very clear that all of the damages recoverable under the Jones Act are limited to compensatory damages. *Miles*, 498 U.S. at 33-36. Thus, punitive damages are unavailable because they have nothing to do with compensating for loss, pecuniary or otherwise. *See Miles*, 498 U.S. at 35 (citing *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 347 (1937) and *Craft*, 237 U.S. at 656). *Van Beeck* and *Craft* address damages available for a survival claim under the FELA and the Jones Act, respectively. Both decisions restrict recovery to "[reasonable compensation] for the loss and suffering of the injured person while he lived." *Craft*, 237 U.S. at 658; *Van Beeck*, 300 U.S. at 347

(explaining that wrongful death and survival claims are "quite distinct" by stating that survival claims are "confined to [the seaman's] personal loss and suffering before he died, while the [wrongful death action] is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death").

The argument that punitive damages are pecuniary damages because they are paid in money is equally unhelpful to Mr. Townsend's cause and this Court's analysis. *See, e.g.*, AAJ Amicus Brief. First, the argument ignores the obvious fact that pecuniary damages are a subset of compensatory damages, and by definition, "are to restore the injured party to the position he or she was in prior to the injury." *Black's Law Dictionary*, 390 (6th ed. 1990). Second, the argument makes a distinction without a difference. All damages, including loss of society damages, are paid in money. Therefore, under the AAJ's definition of pecuniary damages, the *Miles* pecuniary limitation is rendered meaningless.

## IV. Mr. Townsend's Reliance On *Exxon Shipping Co. v. Baker* Is Misplaced

Mr. Townsend's and his amici's reliance on *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, is misplaced because that case does not involve a statute that applies to seamen. In *Baker*, the question was whether the CWA prevents the recovery of punitive

damages by private individuals in a vessel pollution case. Here, the question is whether *Miles* and this Court's other precedent restrict damages recoverable under the Jones Act, the DOHSA, and the FELA.

In *Baker*, no case law existed with respect to analyzing whether the CWA allows for punitive damages. After reviewing the text of the CWA (including the savings clause), this Court found "no clear indication of congressional intent to occupy the entire field of pollution remedies." *Baker*, 128 S. Ct. at 2619. Conversely, one hundred years of case law and over eighty years of congressional history reveal that seamen may not recover punitive damages under the FELA, the Jones Act, or the DOHSA because the damages are neither compensatory nor pecuniary.[6]

## V. Mr. Townsend's Public Policy Arguments Are Unpersuasive

### A. Stereotyping Seamen As "Wards Of Admiralty" Provides No Justification For Ignoring The Jones Act

Left without support from Supreme Court precedent, statutory text, or congressional action to support

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[6] Again, the DOHSA specifically limits recovery to "pecuniary loss." 46 U.S.C. § 30303. Punitive damages are not a pecuniary loss under the DOHSA. *See, e.g., Motts v. M/V GREEN WAVE*, 210 F.3d 565, 572 (5th Cir. 2000) (holding that application of the DOHSA's limitation to pecuniary damages precludes the recovery of punitive damages); *Bergen*, 816 F.2d at 1347 (same).

their argument, Mr. Townsend and his amici invoke the inaccurate, outdated "wards of admiralty" stereotype in an attempt to justify the request to construe the Jones Act and the FELA in a way that allows for the recovery of punitive damages. Mr. Townsend's Merits Brief at p. 23, n. 24. *Miles* recognizes that admiralty has previously "shown a special solicitude for the welfare of seamen and their families" and that "it better becomes the human and liberal character of proceedings in admiralty to give rather than to withhold the remedy," but determines that those policies are insufficient to override the Jones Act. 498 U.S. at 36. *Miles* explains as follows:

> We are not unmindful of these principles, but they are insufficient in this case. We sail in occupied waters. Maritime law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits in [wrongful death and] survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

*Miles*, 498 U.S. at 36. In determining what remedies are available to seamen, this Court should resist Mr. Townsend's request to substitute a rule stating that seamen always triumph because they are a "favored class" for legal analysis based on the Jones Act and the applicable precedent.

Moreover, the stereotype that supports the statement that seamen are wards of the court has become factually untrue and serves no purpose in deciding remedies for seamen living in the twenty-first century. Courts often cite to *Harden v. Gordon*, 11 F. Cas. 480, 483-85 (C.C.D. Me. 1823) (No. 6,047), to support the assertion that seamen are wards of the court. In 1823, the court provides the following description of seamen:

> Every court should watch with jealousy an encroachment upon the rights of seamen, *because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached*. . . . They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, *they are treated in the same manner, as courts of equity are accustomed to treat young heirs* . . . [and] wards with their guardians. . . . They are *considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life*, the most rigid scrutiny is instituted into the terms of every contract, in which they engage.

*Harden*, 11 F. Cas. at 485 (emphasis added); *see also Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782-83, n. 5 (1952) (noting that seamen "are perhaps better educated and better dressed than their fellows of a

century ago, but, in general, as improvident and prone to the extremes of trust and suspicion as their forebears who ranged the seas, but withal a likeable lot"). Other precedent suggests that seamen were "wards of the admiralty" because they were isolated and have "little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman." *Socony-Vacuum Oil Co., v. Smith*, 305 U.S. 424, 431 (1939).

Regardless of the merits of the stereotype employed in 1823 or even 1952, it has no justification today. Instead of "thoughtless," many of today's Jones Act seamen are graduates of the United States Coast Guard Academy, the Merchant Marine Academy, or one of the many other institutions of higher learning that exist in our nation. *Harden*, 11 F. Cas. at 485. Other seamen may not have college educations, but do graduate from high school and take educational courses that allow them to obtain professional sailing licenses from the United States Coast Guard or a comparable organization in their country of origin. The United States Department of Labor statistics further contradict the stereotype that seamen are like "young heirs" and without training "in other pursuits of life." United States Dep't of Labor, *Dictionary of Occupational Titles*, 0.1, § 197 *et seq.* (4th ed. 1991), *available at* http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOT01F.HTM (describing the average vocational preparation, reasoning development, mathematical development, and language development of ship captains, mates, and engineers);

United States Dep't of Labor, *Dictionary of Occupational Titles*, 0.1, § 911 *et seq.* (4th ed. 1991), *available at* http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOT09A.HTM (describing the average vocational preparation, reasoning development, mathematical development, and language development of boatswain, able-bodied seaman, deckhand, ordinary seaman, oiler, and deck cadet). Finally, a review of the complex and dizzying array of international conventions that seamen must follow eliminates the possibility that today's seamen are "thoughtless." *See, e.g.*, 33 C.F.R. § 151.01 *et seq.* (2008) (U.S. Coast Guard regulations implementing procedures, standards and rules commensurate with the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (collectively referred to as the MARPOL Protocol)); 46 C.F.R. § 10.101 *et seq.* (2008) (U.S. Coast Guard regulations implementing procedures, standards and rules commensurate with the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended in 1995 (commonly referred to as STCW)).

Likewise, circumstances have dramatically changed with respect to seamen's working conditions since 1823. Seamen are no longer isolated. Seamen have the benefit of computers, global positioning systems, cellular telephones, and ship-to-shore satellite telephones. *See also* Port Ministries International Amicus Brief, p. 1, n. 2 (explaining that the organization

provides seamen with "free transportation to locations near ports; serv[es] free home cooked meals; provid[es] recreation and relaxation . . . television and reading material . . . free used clothes . . . free internet and e-mail and low cost phone cards so the seafarers can communicate with their families and friends . . . "). Instead of "helpless," seamen may report safety violations to the United States Coast Guard without fear of retaliation. *See* 46 U.S.C. § 2114. Many of today's seamen belong to unions that "champion[ ] the[ir] rights and interests . . . " and provide benefits beyond those provided by federal statute and general maritime law. Sailors' Union of the Pacific Amicus Curiae Brief, p. 2; *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 636-37 (3d Cir. 1990) (noting that the seaman in that case belonged to a union that had "obtained for its members overtime and premium pay, vacation allowances, disability pensions, and amenities such as televisions, washers and dryers, coffee breaks and midnight lunches"). Even this legal proceeding provides a reminder that seamen are no longer "easily overreached" and "helpless": the American Association for Justice, the Sailors' Union of the Pacific, and Port Ministries International have all jumped aboard to attempt to aid the seaman's cause.

In 2009, no basis exists in law or fact for the assumption that seamen need special protections unavailable to other classes of working men and women. Determining a seaman's legal rights based on policy concerns spawned by an outdated stereotype is

wrong. *See Robertson v. Baldwin*, 165 U.S. 275, 299 (1897) (Harlan, J., dissenting) (addressing the wards of the court theory and arguing that the "constitution furnishes no authority for any such distinction between classes of persons in this country"). The correct analysis for determining whether a seaman can recover punitive damages starts and ends with the Jones Act. This Court should decline any invitation to allow the extraordinary remedy of punitive damages because of stereotypes and employment conditions that may have existed over one hundred years ago.

### B. Adding Punitive Damages To Jones Act Seamen's Arsenal Of Remedies Is Unnecessary

In a further effort to circumvent the applicable legal analysis, Mr. Townsend and his amici argue that this Court's confirmation that Jones Act seamen are not entitled to punitive damages in maintenance and cure case will leave them without adequate legal remedies or counsel. *See* Mr. Townsend's Merits Brief at pp. 30-31. Essentially, the opposing briefs argue that plaintiffs' attorneys will refuse to take seamen's cases.

The absence of punitive damages does not change the fact that seamen have more causes of action and remedies than most other employees. As far as causes of action, seamen have a strict liability cause of action for unseaworthiness, a negligence cause of action, and a no fault cause of action for maintenance, cure, and

unearned wages to the end of the voyage. A seaman's estate's potential wrongful death remedies include pecuniary losses (loss of support, loss of nurture and guidance to minor children, and loss of services). A seaman's survival remedy is pre-death pain and suffering and his personal injury remedies include past and future loss wages, past and future medical expenses, and past and future pain and suffering. And, a seaman's maintenance and cure remedies include consequential damages if maintenance and cure are unreasonably withheld and attorneys' fees if the failure to pay is willful.

Seamen have historically preferred the plethora of remedies extended to them under the Jones Act and general maritime law. Prior to the *Vaughan* dissent and the First Circuit's *Robinson* decision, no court allowed seamen to recover punitive damages for the failure to pay maintenance and cure. Even so, seamen lobbied Congress to specifically exclude them from the coverage provided by the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, that was adopted in 1927. *See Warner v. Goltra*, 293 U.S. 155, 160 (1934); *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 135-36 (1930). Seamen requested the statutory exclusion from the LHWCA because *"they preferred the remedy for damages under the [Jones A]ct of 1920* to the benefits that would be theirs under a system of workmen's compensation." *Warner*, 293 U.S. at 160 (emphasis added). This Court notes in *Warner* that the subsequent exclusion of a "master or member of a

crew of any vessel" from the LHWCA indicates that "[t]here can be little doubt that Congress did this in the belief that under the statutes then in force master and crew alike *were already adequately protected in case of injury* or death." *Warner*, 293 U.S. at 160 (emphasis added).

Despite the efforts made to ensure that seamen are not covered under the LHWCA, Mr. Townsend references penalty provisions within the LHWCA as support for his belief that Congress would approve if this Court allowed seamen to recover punitive damages under the Jones Act. *See* Mr. Townsend's Merits Brief at pp. 33-37. Contrary to Mr. Townsend's suggestion, the LHWCA and the Jones Act are mutually exclusive. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 356-57 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991). Mr. Townsend's reference to the LHWCA ignores *Miles'* instruction to utilize the Jones Act as the guiding statute for determining seamen's remedies and ignores the historical fact that seamen prefer the protection of the Jones Act, not the LHWCA.[7]

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[7] Mr. Townsend's attempt to create a new intentional tort is similarly unavailing. Apparently not comfortable with the legal underpinnings of the Eleventh Circuit's decision below, Mr. Townsend proposes that this Court reinvent a seaman's faultless right to maintenance and cure into a new intentional tort action "where the shipowner withholds medical care with the intent to cause pain, disability or injury, or as a part of a scheme or plan to punish seamen. . . ." Mr. Townsend's Merits Brief at p. 2. Mr. Townsend's proposal ignores one hundred years of precedent and

(Continued on following page)

Nothing has changed since seamen emphatically confirmed their preference for seamen's remedies in 1927. Maritime workers still seek seaman, and not longshoreman, status. Seamen's remedies are so pervasive and the desire to seek recovery as a seaman is so attractive that this Court was required to address seaman status four times between 1990 and 1997. *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997); *Latsis*, 515 U.S. 347; *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Wilander*, 498 U.S. 337. In all four cases, the facts involved maritime workers who claimed seaman status, not longshoreman status.

Mr. Townsend also projects a "parade of horribles" if punitive damages are not available for the failure to pay maintenance and cure. Tellingly, Mr. Townsend provides no proof ("scholarly" or otherwise) that the elimination of punitive damages by the Fifth and Ninth Circuits in *Guevara* and *Glynn* created any

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congressional silence on the question presented to create yet another cause of action for seamen. Even if this Court were inclined to twist the contractually based maintenance and cure action defined by *The OSCEOLA*, 189 U.S. 158, *The IROQUOIS*, 194 U.S. 240 (1904), and *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), into an intentional tort, previous decisions of this Court confirm that recovery for such an action is still confined to Jones Act negligence. *See, e.g., Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) (recognizing that the intentional tort of assault is available as a "negligence" action under the FELA); *Alpha S.S. Corp. v. Cain*, 281 U.S. 642, 643 (1930) (recognizing that the intentional tort of assault is a negligence action under the Jones Act).

hardship for seamen. Research of reported Jones Act cases reveals no "shortage" of lawsuits in these circuits, especially when compared to the Eleventh Circuit.

In the end, there is no credible support for the argument that tilting the playing field slightly less in the favor of seamen unfairly diminishes their plentiful remedies or prohibits seamen from access to the courts. Even if future empirical data suggests that an adjustment of the Jones Act is necessary, Weeks Marine reiterates that Congress, not this Court, is the appropriate body to make that change.

## CONCLUSION

The Court should reverse the Eleventh Circuit's decision and hold that a Jones Act seaman may not recover punitive damages in a maintenance and cure case as a matter of law.

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# AMICUS CURIAE BRIEF

No. 08-214

IN THE

# Supreme Court of the United States

ATLANTIC SOUNDING CO., INC., and
WEEKS MARINE, INC.

*Petitioners,*

v.

EDGAR L. TOWNSEND,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT


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## INTEREST OF AMICUS CURIAE[1]

The American Association for Justice (AAJ) is a voluntary national bar association whose lawyer members primarily represent individual plaintiffs in civil actions. The mission of AAJ is to promote a fair and effective judicial system and to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America's courtrooms. Through its Admiralty Law Section, AAJ has championed the remedies that courts have traditionally made available under general maritime law. Those remedies would be undermined if the Court adopted Petitioners' proposed new rule barring seamen from seeking punitive damages.

## SUMMARY OF ARGUMENT

Seamen have always had the right under general maritime law (a body of federal common law) to sue shipowners for punitive damages. Seamen deserve and need this right because of the unique circumstances of their work environment. Seamen have "heightened legal protections (unavailable to other maritime workers) ... because of their exposure to the 'perils of the sea'." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). Seamen also need these protections because, "as a class, they are peculiarly

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to its preparation. Letters on file with the Clerk show that all parties consent to its submission.

[exposed to] the harsh consequences of arbitrary and unscrupulous actions of their employers." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572 (1982).

In *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), this Court unanimously held that general maritime law entitles commercial fishermen to recover punitive damages for seriously blameworthy violations of their right to earn a living at sea. Seamen have traditionally been a more "favored class" of litigants than fishermen. *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932). *Baker* thus reaffirms seamen's rights to sue for punitive damages.

No Act of Congress addresses punitive damages at maritime law, and none casts any doubt on seamen's rights to seek punitive damages. The Jones Act, 46 U.S.C. § 30104, granting seamen a negligence cause of action against their employers, "was remedial [legislation], for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936). The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301-30308, provides a wrongful death remedy covering fatal accidents "on the high seas beyond three nautical miles from the shore of the United States" (§ 30302). It does not mention seamen or punitive damages, it does not apply to matters arising in territorial waters, and it has nothing to say about nonfatal accidents.

The Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, which is incorporated by reference in the Jones Act, was enacted to "extend

and enlarge" railroad workers' rights and does not "limit or take away from ... an employee any right theretofore existing by which ... employees were entitled to a more extended remedy than that conferred upon them by the Act." 45 Cong. Rec. 4048 (1910). Railroad workers could sue for punitive damages before FELA was enacted, and under the better view of the law they still can. In any event, this Court has repeatedly held that FELA restrictions on railroad workers' rights cannot displace maritime law's protections of seamen.

Punitive damages issues were not involved in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which dealt solely with the types of compensatory damages available when seamen are killed at work. To the extent that *Miles* has any indirect bearing on the right of seamen to seek punitive damages, it supports the right. *Miles* holds that the Jones Act "incorporate[s]" the pre-Jones Act jurisprudence (*id.* at 32), and it states that "[t]he Jones Act evinces no general hostility to recovery under maritime law" (*id.* at 29).

## ARGUMENT

### I. *EXXON SHIPPING CO. v. BAKER* SHOWS THAT FEDERAL MARITIME LAW ALLOWS SEAMEN TO SEEK PUNITIVE DAMAGES.

#### A. *Baker* Reaffirms Maritime Law's Recognition of Punitive Damages.

##### 1. *Baker* awarded maritime punitive damages.

Last term in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), this Court upheld a punitive damages award to fishermen whose livelihoods were damaged by the *Exxon Valdez* oil spill. The Court was unanimous (8-0, Justice Alito not participating) that a punitive award was appropriate.[2]

The Court was also unanimous that the punitive award was based solely on federal maritime common law. (A frequently-used synonym for federal maritime common law is "general maritime law."[3]) The Court emphasized this, stating that "maritime law remains federal common law" (*id.* at 2616) and asserting its "jurisdiction [under the grant of admiralty and maritime jurisdiction in U.S. Const. art. III, § 2, cl. 3] to decide [the case] in the manner of a common law court, subject to the authority of

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[2] Five Justices held that the lower courts' punitive award of $2.5 billion must be cut to $507.5 million; three argued that the $2.5 billion award should have been left standing.

[3] See, e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21 (1990).

Congress to legislate otherwise if it disagrees with the judicial result" (*id.* at 2619).

Astonishingly, Petitioner's Brief does not even mention *Baker*. The case is nevertheless definitive that general maritime law includes the punitive damages remedy.

### 2. *Baker* rests on deep history.[4]

Writing for the Court in *The Amiable Nancy*, 16 U.S. 546, 558 (1818), Justice Story affirmed that general maritime law authorized "exemplary damages [for] the proper punishment [of] lawless misconduct." In *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), the Court stated:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.

And in *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 107 (1893), the Court cited *The Amiable Nancy* and *Day* for the following proposition:

> In this court the doctrine is well settled that in actions of tort the jury, in

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[4] See generally David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997).

> addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations.

The *Lake Shore* Court went on to say that "courts of admiralty ... proceed ... upon the same principles as courts of common law, in allowing exemplary damages" (*id.* at 108).

### B. Seamen Have Always Had the Right To Seek Punitive Damages.

Study of the early American jurisprudence on seamen's rights soon brings the realization that "nineteenth-century seamen led miserable lives."[5] Shipowners owed passengers decent treatment,[6] but they could often harshly misuse seamen without anyone's batting an eye. Congress did not outlaw "cruel and unusual punishment" of seamen until 1835,[7] and flogging was legal until 1850.[8]

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[5] David W. Robertson, Steven F. Friedell & Michael F. Sturley, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 163 (2d ed. 2008).

[6] See Robertson, *supra* note 4, at 88-90 (analyzing *Chamberlain v. Chandler*, 5 F. Cas. 413, 414 (C.C.Mass. 1823) (No. 2,575), in which punitive damages were awarded against a ship's captain for "lasciviousness" and other misconduct toward passengers).

[7] Act of March 3, 1835, 4 Stat. 777.

[8] See Act of Sept. 28, 1850, 9 Stat. 515.

Throughout the century, a seaman who deserted the ship could be arrested by public authorities and forcibly returned.[9]

Nevertheless, seamen were "emphatically the wards of the Admiralty." *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 620 (1827) (Johnson, J., concurring). (This Court has called seamen "wards of admiralty" in at least 23 decisions.[10]) When seamen's employers went too far, admiralty courts would award punitive damages, just as in cases involving mistreated passengers and other victims of abuse. In reviewing these awards, it must be noted that "[t]he distinction between punitive and compensatory damages is a modern refinement." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927). "American courts [began] to speak of punitive damages as separate and distinct from compensatory damages [only as] the [19th] century progressed." *Baker*, 128 S.Ct. at 2621.

The earliest published indication that American admiralty courts would protect seamen by assessing their abusers with monetary punishment seems to be *Swift v. The Happy Return*, 23 F. Cas. 560, 561 n.2 (D.Pa. 1799) (No. 13,697), where Judge Peters discussed an earlier (unnamed) case in which he had found a shipowner guilty of a "very atrocious" failure to provide seamen with proper food. Judge Peters said he handled that situation by threatening

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[9] See *Robertson v. Baldwin*, 165 U.S. 275 (1897) (holding that statutes authorizing the arrest and forced return of deserters were not in conflict with the Thirteenth Amendment).

[10] See WestLaw's SCT database and search "wards" /s "admiralty."

the shipowner with a judicially-created monetary penalty,[11] thereby bringing about an "accommodation" between the seamen and the shipowner. *Id.*

The earliest reported decision in which a seaman was actually awarded punishment money seems to have been *Gould v. Christianson*, 10 F. Cas. 857 (S.D.N.Y. 1836) (No. 5,636). Here, the ship's master's discipline of an inexperienced and clumsy "gentleman's son" (*id.* at 857) who had shipped as an apprentice seamen was held excessive under the circumstances. The court deemed it necessary to "augment the damages beyond a mere remuneration for the bodily injury" in order to deter "coarse and rude usage" of such an apprentice in furtherance of our country's "deep interest in encouraging young men of capacity, ambition, and good character, to seek employment in the merchant marine." *Id.* at 863-64.

A number of other courts also made punitive awards to seamen. In *The Rolph*, 293 F. 269 (N.D.Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924), the ship's mate severely beat a seaman and the master then callously refused to provide medical care. The court described the mate as a "brutal ... giant,

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[11] The Act of July 20, 1790, 1 Stat. 135, requiring shipowners to provide adequate food and water "during the voyage" and imposing a penalty for "short allowance," did not cover Judge Peters's "atrocious" case, which involved seamen's "[e]xpenses for boarding on shore." 23 F. Cas. at 562 n.2. Judge Peters said the penalty he threatened the shipowner with "would have gone the length of payment equal to that directed [in the statute] for short allowance." *Id.*

weighing in the neighborhood of 285 pounds, all bone and muscle, and with a reputation for ferocity as wide as the seven seas." 293 F. at 269. It noted that the master "brutally refused" the requested medical care "with curses and words of vituperation" (*id.* at 270-72). It emphasized that "[s]ailors on an American ship ... must not be subject to such treatment" because "it is of the utmost importance to the manifest destiny of this republic upon the ocean that the youth of America should be attracted to the sea" (*id.* at 271). To enforce this national policy, the court made a combined compensatory/punitive award of $10,000 (see *id.* at 272). (According to the U.S. Bureau of Labor Statistics, $10,000 in 1923 was worth $124,225 in 2008 dollars.[12])

In *The Margharita*, 140 F. 820 (5th Cir. 1905), a seaman who fell overboard and lost his leg to "a shark or some other marine monster" (*id.* at 821) was denied proper medical care for "nearly four months" (*id.* at 825). During the four-month delay the seaman was in "unspeakable agony ... with the ragged extremity of his cruelly wounded leg incased at times in a box of hot tar and at other times rudely bandaged by the kind, but inexperienced, hands of his shipmates" (*id.* at 828). The trial court held the vessel liable for $1500 in compensatory and punitive damages, stating:

> It is indispensable that in cases of serious injuries to seamen, ... that in order to obtain proper surgical or medical assistance for them, the courts of admiralty, which proceed ever upon the broadest principles of humanity and

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[12] See www.bls.gov/data/inflation_calculator.htm.

> justice, should enforce the reasonable rules so frequently announced by the courts .... Such is the duty of the courts, not only to compensate the seaman for his unnecessary and unmerited suffering when the duty of the ship is disregarded, but [also] to emphasize the importance of humane and correct judgment under the circumstances on the part of the [ship's] master.

*Id.* The Fifth Circuit reversed, not because of any doubt about the propriety of the punitive damages remedy, but on the view that the ship's master had done as well as he could under the circumstances.

Other cases awarding punitive damages to seamen include *The Troop*, 118 F. 769, 770-73 (D.Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904) ("shocking" and "monstrous" refusal of medical care yielded combined compensatory/punitive award of $4000); *Unica v. United States*, 287 F. 177, 180 (S.D.Ala. 1923) (characterizing the ship's master's response to a seaman's need for medical attention as "gross [and] inexcusable ... indifferen[ce]" and awarding $1500 in compensatory and punitive damages); *The City of Carlisle*, 39 F. 807, 811-17 (D.Ore. 1889) (calling the ship's master's treatment of a seriously injured 16-year-old seaman "brutal and indecent," "simply inhuman," and "a grievous wrong" and awarding $1530 in compensatory and punitive damages); *Tomlinson v. Hewett*, 24 F. Cas. 29, 32 (D.Cal. 1872) (No. 14,087) (captain's tricking a seaman with smallpox into going ashore so as to sail off and leave the sick man behind merited avowedly "large" $2500 award); *Brown v. Howard*, 14 Johns. 119 (N.Y. 1817) ("harsh and rigorous, and altogether

unjustifiable" punishment of seaman "merit[ed] severe animadversion" and led to a combined compensatory/punitive award).

*See also Pacific Packing & Nav. Co. v. Fielding*, 136 F. 577, 579-80 (9th Cir. 1905) ($5000 award against a shipowner that included "smart money ... as a penalty upon the wrongdoer" for ship captain's "wanton or oppressive conduct" in imprisoning a seaman was reversed because the captain was not sued and the defendant shipowner was not vicariously liable for punitive damages); *Latchimacker v. Jacksonville Towing & Wrecking Co.*, 181 F. 276, 278-79 (C.C.S.D. Fla. 1910), *aff'd*, 184 F. 987 (5th Cir. 1910) (remitting $10,000 jury award against a towing company that injured a seaman aboard another vessel to $4826 on the view that the jury's award included "exemplary damages" and that no "wantonness or reckless negligence on the part of the defendant" had been shown); *Sheridan v. Furbur*, 21 F. Cas. 1266, 1269 (S.D.N.Y. 1834) (No. 12,761) (holding that a seaman who had been subjected to "unnecessarily abrupt and severe" discipline was entitled to demand "a punishment in damages corresponding to the wantonness of the wrong," but that the seaman had forfeited his entitlement by admitting that he brought suit only at the instigation of an enemy of the defendant).

See also the dicta in the following cases (presented here in chronological order): *Sampson v. Smith*, 15 Mass. 365, 370 (1819) (stating that "malicious or vindictive" punishment of a seaman would yield "retributive justice [to] apportion the penalty and the damages to the malignity of the [punisher's] motives.") *Elwell v. Martin*, 8 F. Cas. 584, 587-88 (D.Me. 1824) (No. 4,425) (indicating that

"a criminal abuse of power" in punishing a seaman would warrant "vindictive" damages); *Hutson v. Jordan*, 12 F. Cas. 1089, 1092 (D.Me. 1837) (No. 6,959) (suggesting that ship's officers who assault seamen are exposed to "exemplary damages"); *Sherwood v. Hall*, 21 F. Cas. 1292, 1293 (C.C.D. Mass. 1837) (No. 12,777) (dictum that the master of a ship who took on a minor as a seaman, knowing this was against the seaman's father's wishes, could be held to "severe" and perhaps "exemplary damages"); *Thompson v. Oakland*, 23 F. Cas. 1064, 1065 (D.Mass. 1841) (No. 13,971) (dictum that "exemplary damages" will lie for "wanton violation of [a seaman's] contract [of employment]"); *Jay v. Almy*, 13 F. Cas. 387, 389-390 (C.C.D. Mass. 1846) (No. 7,236) (master who wrongly suspected a seaman of fomenting mutiny and imprisoned him was not liable for "smart money or vindictive damages" only because his actions, while exhibiting poor judgment, were not malicious); *The Australia*, 2 F. Cas. 236, 238 (D.Me. 1859) (No. 667) (dictum that "aggravated damage[s]" will lie if a ship leaves a seaman in a foreign port without good cause); *The General Rucker*, 35 F. 152, 155, 158-59 (W.D.Tenn. 1888) (stating that a vessel whose mate "tapped [a seaman] on the head with [a] monkey-wrench," knocking him into the river, was "no doubt" exposed to punitive damages but finding that the mate's conduct was not quite bad enough[13]); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) (stating that a steamboat captain who left port with waterfront laborers aboard and

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[13] The court thought the mate's conduct understandable because "[i]t has not been long since the corporal chastisement of seamen was permitted by law, ... and the officers of steamboats find it hard to give it up, no doubt." 35 F. at 158.

tried to force them to serve as crew members would have been "mulcted in exemplary damages" if sued but holding that the defendant shipowner was not vicariously liable for punitive damages); *The Ludlow*, 280 F. 162, 163-164 (N.D.Fla. 1922) (indicating that a ship's captain who unjustifiably imprisoned a seaman would be liable for "exemplary or punitive" damages but holding that the captain's employer was not vicariously liable for punitive damages).

Other decisions showing that seamen whose rights were seriously abused by their employers were entitled to seek punitive damages include the five cases treated in the concluding paragraph of Section I-B of the Amicus Brief of Sailors' Union of the Pacific.

### C. *Baker* Reaffirms Seamen's Rights to Seek Punitive Damages.

The parties awarded punitive damages in *Baker* were "commercial fishermen, Native Alaskans, and landowners" (128 S.Ct. at 2613); the Court had no occasion to directly address seamen's rights. However, it is hard to fathom how seamen, who by long tradition are admiralty's most favored litigants,[14] could somehow be worse off under federal maritime law than fishermen and landowners.

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[14] See, e.g., *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932) (stating that seamen are "a favored class"); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (stating that seamen have "heightened legal protections [that are] unavailable to other maritime workers"); *id.* at 379 (emphasizing "admiralty law's favored treatment of seamen") (Stevens, J., concurring).

In citing *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), as the basis for the fishermen's cause of action for loss-of-livelihood damages, 128 S.Ct. at 2630 n. 21, the *Baker* Court lent indirect emphasis to the view that it makes no sense for seamen to lack a remedy available to commercial fishermen. The *Oppen* court based its recognition of the fishermen's cause of action on the view that fishermen "have been treated as ***seamen***" and are thus allowed to invoke "the familiar principle that ***seamen are the favorites of admiralty*** and their economic interests entitled to the fullest possible legal protection." 501 F.2d at 561, 567 (emphasis added).

## II. PETITIONERS ARE URGING A GROTESQUE DISTORTION OF *MILES V. APEX MARINE*.

Petitioners' invitation to abolish seamen's rights to seek punitive damages is based solely on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Nothing in *Miles* even hints this would be a good idea.

### A. The Holdings and Reasoning of *Miles*.

#### 1. Facts and holding: punitive damages were not at stake.

Mercedel Miles was the mother of a seaman named Ludwick Torregano who died from 62 stab wounds inflicted by a fellow crew member on the vessel *M/V Archon*. Miles pleaded two causes of action against the *Archon*'s owner and operators, asserting their liability for unseaworthiness under the general maritime law and for negligence under the Jones Act, 46 U.S.C. § 30104. She asserted two

types of fatal-injury remedies,[15] under which she sought five categories of compensatory damages: (a) a wrongful death remedy that in Miles's view should allow her to recover damages for loss of support, loss of services, and loss of society (sometimes called loss of companionship or loss of consortium[16]); and (b) a survival remedy that Miles argued should allow Torregano's estate to recover damages for his pain and suffering and for his lost future earnings.

Miles also sought punitive damages. The trial court struck the punitive damages claim. Miles did not sue the vicious stabber,[17] but only his employers (the ship's operators), and the trial court held that the facts did not support holding the employers vicariously liable for punitive damages. The Fifth Circuit affirmed this ruling. *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989). The punitive damages issue dropped out of the case at that point. This Court was not concerned with the issue, and it mentioned punitive damages only in the course of reciting the case's procedural history. 498 U.S. at 22.

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[15] The distinction between the two types of fatal-injury remedies is fundamental. Wrongful death actions seek to redress the victim's family's losses. Survival actions seek to recover on behalf of the victim's estate "whatever ... the deceased ... would have ... been able to sue [for] at the moment of ... death—for example, for his pain and suffering, loss of wages, and medical expenses between the time of injury and death." Dan B. Dobbs, THE LAW OF TORTS 804 (Hornbook ed. 2000).

[16] 882 F.2d at 812.

[17] She tried to, but he "was outside the jurisdiction of the district court and could not be served." *Miles v. Melrose*, 882 F.2d 976, 981 (5th Cir. 1989).

Respecting Miles's five compensatory damages claims, the trial court decided against the wrongful death claim for loss of society and against the survival claim for lost future earnings. It upheld the other three claims. The Fifth Circuit agreed on these points and affirmed an award of $7800 for Miles's loss of support and services and $140,000 for Torregano's pain and suffering. 498 U.S. at 22. This Court granted plaintiff's petition for certiorari to decide "whether the parent of a seaman who died from injuries aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earnings survives his death." 498 U.S. at 21.

The *Miles* Court answered both questions no, affirming the Fifth Circuit's decision that Miles's wrongful death remedy did not include damages for loss of society (498 U.S. at 32-33) and that her survival remedy did not include damages for Torregano's lost future earnings (*id.* at 36). Understanding these holdings requires a look at the legal background.

### 2. The plaintiff's two causes of action.

This Court was not concerned with the *Miles* defendants' liability *vel non*, but a quick look at this matter may enhance understanding of the decision.

The defendants' liability under the unseaworthiness cause of action was unproblematic. A shipowner is strictly liable for unseaworthiness when an operationally defective ship hurts a seaman, and the Fifth Circuit ruled that the vicious stabber's "extraordinarily violent disposition demonstrated

that he was unfit and therefore that the *Archon* was unseaworthy as a matter of law." 498 U.S. at 22.

The defendants' liability under the cause of action for Jones Act negligence was only slightly less obvious. The evidence showed that the defendants should long since have known that the stabber was a dangerous man. See 882 F.2d at 984.

### 3. The plaintiff's two fatal-injury remedies.

All of the issues addressed in *Miles* involved the categories of compensatory damages available in maritime wrongful death and survival actions. Potentially, the sources of these remedies were the Jones Act, 46 U.S.C. § 30104, and the holding in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), that general maritime law includes a wrongful death remedy and (arguably[18]) a survival remedy.

The Jones Act was enacted in 1920 to fill a gap in federal maritime law's fabric of protections for seamen. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1970). The gap stemmed from *The Osceola*, 189 U.S. 158 (1903). In that case the question was whether a seaman injured at work on a vessel had a cause of action for the negligence of the vessel's master in bringing about the injury. The Court held no, noting that injured seamen were entitled to maintenance (room and board) and cure (medical care) and could sue in tort for unseaworthiness, but

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[18] The *Miles* Court "decline[d] to address the issue" whether *Moragne* created a survival remedy. 498 U.S. at 34.

holding that they had no action against their employers for workplace negligence. *Id.* at 175.

The Jones Act fills the *Osceola* gap by incorporating by reference the provisions of the 1908 Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. FELA sketches out a negligence cause of action for railway workers and their families. It includes a wrongful death remedy, 45 U.S.C. § 51, and a survival remedy, 45 U.S.C. § 59.

The portion of *Miles* concluding that Miles's wrongful death remedy would not redress loss of society, 498 U.S. at 32-33, proceeded in three steps. The Court first looked to a pre-Jones Act decision, *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59 (1913), which gave a narrow construction to the FELA wrongful death provision. The provision (45 U.S.C. § 51) says nothing about the categories of damages available, but the *Vreeland* Court reasoned that earlier and contemporaneous wrongful death statutes were generally confined to "pecuniary loss," that loss-of-society damages were not pecuniary because they "cannot be measured or recompensed by money," and that in enacting FELA the 1908 Congress must have meant to follow the prevailing view. 227 U.S. at 70-71.

In its second step, the *Miles* Court concluded that *Vreeland* precludes recovery for loss of society in wrongful death actions under the Jones Act, explaining:

> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA

> unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. There is no recovery for loss of society in a Jones Act wrongful death action.

498 U.S. at 32 (citation omitted).

The *Miles* Court's third step determined that the Jones Act preclusion of loss of society damages also controlled the plaintiff's general maritime (*Moragne*-based) wrongful death action. The Court explained:

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

498 U.S. at 32-33.

Turning to the issue of whether Miles's survival action allowed recovery for Torregano's lost future income, the Court's reasoning was similar. Taking it as settled that the Jones Act/FELA survival remedy (45 U.S.C. § 59) does not allow such damages, the Court stated that "[b]ecause Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law." 498 U.S. at 36.

### B. Petitioners' Imaginary *Miles*.

The *Miles* opinion does not touch upon any issues other than the types of compensatory damages available in maritime fatal-injury litigation. Petitioners' Brief (at 19) concedes that "punitive damages are non-compensatory." So how do petitioners set about transmogrifying a decision addressing compensatory damages in fatal injury cases into one controlling punitive damages in personal injury cases? Petitioners' technique is a two-part assertion—it pervades Petitioners' Brief—that "[p]unitive damages are non-pecuniary damages" (at 4) and that "*Miles* holds that seamen may not recover non-pecuniary damages" (at 16). This is the petitioners' linchpin assertion, and both parts of it are wrong.

#### 1. Punitive damages are pecuniary.

In ordinary English, "pecuniary" means "consisting of or pertaining to money" or "requiring

the payment of money."[19] BLACK'S LAW DICTIONARY (8th ed. 2004) defines "pecuniary damages" as "damages that can be estimated and monetarily compensated" and "nonpecuniary damages" as "damages that cannot be measured in money." By any of these definitions, punitive damages are pecuniary. They are awarded as money, can be estimated, and—as recently exhaustively analyzed by this Court in *Baker*—are awarded as "***measured*** retribution." 128 S.Ct. at 2633 (emphasis supplied).

Petitioners' argument not only proposes an odd definition of the term "nonpecuniary." It also entails the implausible suggestion that the *Miles* Court would have characterized punitive damages that way. This seems plainly not so. In her opinion for the Court in *Miles*, Justice O'Connor used the term "nonpecuniary" just twice, at each instance tying it tightly to the issue of compensatory damages for loss of society.[20] And not much more than a year before writing *Miles*, Justice O'Connor repeatedly referred to punitive damages as "pecuniary punishment." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 295-97 (1989) (O'Connor, J., concurring in part and dissenting in part). *See also Austin v. United States*, 509 U.S. 602, 614 n.7 (1993) (Court's opinion joined by Justice O'Connor characterizing a civil forfeiture as "pecuniary punishment").

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[19] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 965 (1981).

[20] See 498 U.S. at 30 ("nonpecuniary loss of society suffered as the result of the death"); *id.* at 31 ("non-pecuniary loss, such as loss of society").

The pecuniary-nonpecuniary distinction came into *Miles* from *Vreeland*. The *Vreeland* Court was no more concerned with punitive damages than the *Miles* Court, but it seems equally clear that the *Vreeland* Court would not have characterized punitive damages as nonpecuniary. At the time *Vreeland* was decided, it seems to have been generally thought that punitive damages are properly conceptualized as pecuniary rather than the reverse. For example, in *Louisville, Evansville, & St. Louis Railroad Co. v. Clarke*, 152 U.S. 230, 239 (1894), the Court described an ancient German remedy (called a "weregild") as a privately-initiated proceeding designed to give the victim of a crime "a pecuniary satisfaction" while effecting "the punishment of public crimes." This sounds very like a modern action for punitive damages. Moreover, in the pre-*Vreeland* jurisprudence this Court routinely referred to civil and criminal fines and penalties of all kinds as "pecuniary punishment."[21]

The pecuniary-nonpecuniary distinction is a useful tool for classifying subtypes of compensatory damages; classifying loss of society and pain and suffering as nonpecuniary is a signal that their

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[21] See *Oklahoma ex rel. West v. Gulf, C. & S.F.R. Co.*, 220 U.S. 290, 299 (1911); *Schick v. United States*, 195 U.S. 65, 77 (1904); *Carter v. McLaughry*, 183 U.S. 365, 393 (1902); *Keck v. United States*, 172 U.S. 434, 448 (1899); *Stone v. United States*, 167 U.S. 178, 186 (1897); *The Bayonne*, 159 U.S. 687, 688 (1895); *Huntington v. Attril*, 146 U.S. 657, 681 (1892); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 299 (1888); *Coffey v. United States*, 116 U.S. 436, 444 (1886); *Ex parte Garland*, 71 U.S. 333, 342 (1866); *Norris v. Crocker*, 54 U.S. 429, 437 (1851); *United States v. Carr*, 49 U.S. 1, 8-9 (1850).

assessment entails special difficulties and may require special restrictions. But the pecuniary-nonpecuniary distinction can do no useful work in the completely different realm of punitive damages; "[i]t would be an abdication of judicial responsibility to preclude recovery of punitive damages merely because they are 'nonpecuniary.'"[22]

None of the authorities petitioners cite for the proposition that punitive damages are nonpecuniary makes any effort to justify the appellation; each merely proclaims it, seeming eager to succumb to word magic. All of the explicit judicial statements that punitive damages are nonpecuniary can be traced to a terse *ipse dixit* in *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984).

Petitioners' Brief's citation (at 4, 7, 19, 25) of *Barnes v. Gorman*, 536 U.S. 181 (2002), is puzzling. The Court did not say that punitive damages are nonpecuniary; instead it affirmed the truism that "[p]unitive damages are not compensatory" (*id.* at 189), which helps to show how inapt the nonpecuniary term is in the punitive damages context.

---

[22] Robert Force, *The Curse of* Miles v. Apex Marine Corp.*: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 793 (1995). See *also Portwood v. Copper Valley Elec. Ass'n*, 785 P.2d 541, 543 (Alaska 1990) ("Because punitive damages are not compensatory they are not subject to the pecuniary loss limitation."); Robertson, *supra* note 5, at 164 (deploring the "mind-numbing [effect of] the 'nonpecuniary' tag").

### 2. *Miles* does not rule out all nonpecuniary damages for seamen.

Even in the compensatory damages context, the pecuniary-nonpecuniary distinction has limited utility. The *Miles* Court used the distinction as a tool for deciding the loss of society issue, and only for that. Miles's claim for Torregano's future earnings was indisputably a pecuniary-loss claim, yet the Court rejected it.

On the other hand, the Court gave three clear indications that it approved of Jones Act plaintiffs' recovering for pain and suffering, although this is a paradigmatic nonpecuniary item. (a) The Court said that "[t]he Jones Act, through its incorporation of FELA, provides that a seaman's right of action for injuries due to negligence survives to the seaman's personal representative." 498 U.S. at 33 (citation omitted). Injured seamen invariably seek pain and suffering damages. (b) The Court (*id.* at 35) cited *St. Louis, Iron Mountain, & Southern Railway Co. v. Craft*, 237 U.S. 648 (1915), for the proposition that the FELA survival remedy, 45 U.S.C. § 59, allows recovery for "losses suffered during the decedent's lifetime." In *Craft*, 237 U.S. at 661, the Court affirmed a $5000 survival award for the deceased's pain and suffering. (In 2008 dollars, the *Craft* award was worth about $105,161.[23]) (c) And (498 U.S. at 22) the *Miles* Court noted with no hint of disapproval that the Fifth Circuit had awarded "$140,000 for Torregano's pain and suffering."

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[23] See *supra* note 12.

### C. *Baker*'s Analysis of Statutory Preemption Demolishes Petitioners' Interpretation of *Miles*.

In *Baker*, defendant Exxon argued strenuously that the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*, preempted the general maritime punitive damages remedy. This Court unanimously rejected Exxon's preemption argument. The Court's explanation (128 S.Ct. at 2619) comprised the six steps quoted below. The italicized statement following each of the quoted steps brings the *Baker* reasoning to bear on the present case.

> [1] Exxon ... admit[s] that the CWA does not displace compensatory remedies for consequences of water pollution, even those for economic harms.
>
> [*Correspondingly, Petitioners' Brief concedes at pp. 7-8 that seamen are entitled to sue for unpaid maintenance and cure and for "compensatory damages for the failure to pay maintenance and cure."*]
>
> [2] This concession ... leaves Exxon with the ... untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss.
>
> [*A fortiori, petitioners' position that the Jones Act somehow preempts punitive but not compensatory damages is equally untenable.*]

> [3] But nothing in the statutory text [of the CWA] points to fragmenting the recovery scheme this way ...
>
> [*The Jones Act likewise says nothing about maintenance and cure and nothing about punitive damages.*]
>
> [4] [A]nd we have rejected similar attempts to sever remedies from their causes of action. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256 (1984).[24]
>
> [*In arguing that the Jones Act does not impair the maintenance and cure cause of action but does cut into maintenance and cure remedies, petitioners seek* ***precisely*** *the kind of severance that* Silkwood *and* Baker *condemned.*]
>
> [5] All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies....
>
> [*There can be no serious contention that the Jones Act occupied the field of seamen's remedies. "The* ***only*** *purpose of the Jones Act was to remove the bar created by The Osceola, so that seamen*

---

[24] In the course of holding that federal statutes regulating nuclear safety did not preempt a state-law action for punitive damages, the *Silkwood* Court stressed the venerability of the punitive damages remedy and said that the remedy should subsist absent "irreconcilable conflict" with federal law or "frustrat[ion] [of] the objectives of the federal law." 464 U.S. at 256.

*would have the same rights to recover for negligence as other tort victims."*[25] *"[A] remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts."*[26]]

[6] [N]or for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption.

[*Petitioners do not suggest any way in which the Jones Act remedial scheme could be frustrated by allowing punitive damages against employers who flout the maintenance and cure obligation.*]

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[25] *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (emphasis added; citation and internal quotation marks omitted).

[26] *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 283-84 (1980).

### D. Other Aspects of Baker Also Show that *Miles* Does Not Diminish the Maritime Punitive Damages Remedy.

*Miles* played no significant part in *Baker*.[27] There was no suggestion by any member of the *Baker* Court that *Miles* impaired or questioned the general maritime punitive damages remedy. This further shows that petitioners are wrong in claiming that *Miles* impedes the recovery of punitive damages at maritime law. If *Miles* did have that meaning, *Baker* would have been decided, or at least analyzed, differently.

### E. Petitioners' Interpretation of *Miles* is Inconsistent With All of This Court's Jurisprudence Treating Congressional Preemption of Federal Common Law.

This Court has consistently striven to harmonize Congress's contributions to maritime law with the underlying maritime common law. For

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[27] The *Baker* majority opinion indicates that *Miles* had only peripheral relevance and did not impede the Court's authority to deal with "a perceived defect in [the maritime] common law [punitive damages] remedy" by creating a new ratio-based ceiling on maritime punitive damages. 128 S.Ct. at 2629-30 & n. 21. Justice Stevens's opinion—disagreeing with the new ratio-based ceiling—says there is no "question that the Court possesses the power to craft the rule it announces today" (*id.* at 2638) but that the wiser *Miles*-driven approach would have heeded "that Congress has affirmatively chosen *not* to restrict the availability" of the punitive damages remedy (*id.* at 2635; emphasis in original).

example, in *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 817-19 (2001), this Court found nothing in the Jones Act, Death on the High Seas Act (DOHSA) , or the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 *et seq.*, that impaired the validity of an action under maritime common law for wrongful death damages suffered by the mother of a negligently-killed shipyard worker. Focusing on the Jones Act, the Court stated: "[E]ven as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes." *Id.* at 818 (citing *Miles*).

Similarly, in *The Arizona v. Anelich*, 298 U.S. 110 (1936), the Court refused to interpret the Jones Act in accordance with FELA decisions applying the assumption of risk defense against workers. Instead, the Court rejected the defense, explaining that the Jones Act must "be interpreted in harmony with the established doctrine of maritime law of which it is an integral part." *Id.* at 123.

*See also City of Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189, 194 (1995) (holding that a statute authorizing postjudgment interest did not cast any negative light on the general maritime law's prejudgment interest remedy); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 282-84 (1980) (holding that nothing in the Jones Act or DOHSA stood in the way of a general maritime action by the wife of a harbor worker nonfatally injured aboard a ship in state territorial waters); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260-63 (1979) (holding that the 1972 amendments to the LHWCA must be interpreted consistently with the general

maritime rule of joint and several liability); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 n.15, 625 (1978) (indicating that DOHSA impairs general maritime wrongful death remedies only when the statute "speak[s] directly to [the] question"); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393-403 (1970) (determining that nothing in the Jones Act, LHWCA, or DOHSA impeded the Court's creation of a maritime wrongful death remedy); *Cox v. Roth*, 348 U.S. 207, 209 (1955) (holding that whether a Jones Act suit survives the death of the tortfeasor should be decided under the general maritime law rather than by "literal application of the words of the F.E.L.A."); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247-248 (1942) (holding that neither statutes protecting seamen against unfavorable compromises of wage claims nor statutes protecting LHWCA workers against unfavorable compromises of workers' compensation claims impaired a general maritime doctrine protecting seamen against unfavorable compromises of maintenance and cure and Jones Act claims); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 374-77 (1932) (holding that the Jones Act does not impinge upon the rights of seamen to sue for damages for nonpayment of maintenance and cure); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-39 (1928) (holding that the Jones Act "was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages.").

Outside the maritime-law field, federal courts' common-law-making authority is constrained by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), but sizeable bodies of federal common law subsist. Here, too, there is a presumption that "where a [federal] common-law principle is well established ..., the

courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'"[28]

Because the Jones Act incorporates FELA, FELA cases have almost direct bearing on seamen's cases. It is thus particularly significant that this Court has consistently sought to interpret FELA so as to bring it into harmony with the underlying common law. *See, e.g., Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 168-69 (2007); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337-38 (1988).

The governing principle is all of the foregoing cases is this:

> Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

*Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Note that in *Garris*, *supra*, this Court had no doubt that *Miles* was fully compatible with this principle. Petitioners' invitation to distort *Miles* into a stark

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[28] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citation omitted); see also *United States v. Texas*, 507 U.S. 529, 534 (1993); *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967).

outlier from this entire body of jurisprudence should be declined.

## III. THE JONES ACT DOES NOT IMPEDE SEAMEN'S ACCESS TO PUNITIVE DAMAGES.

The assertion that the Jones Act disallows punitive damages is at the heart of petitioners' case. The assertion is wrong.

### A. Jones Act Plaintiffs Have the Right to Seek Punitive Damages.

#### 1. The Jones Act did not take away any rights of seamen.

In more than a dozen cases, this Court has affirmed that the Jones Act did not take anything away from seamen. See, e.g., *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936) ("[T]he Jones Act ... was remedial [legislation], for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it."); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942) (citations omitted) ("[The Jones Act] is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection to its wards."); *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932) ("Seamen have always been regarded as wards of the admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class [citation omitted]."); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-139 (1928) ("[The Jones Act] was not intended to restrict in any

way the long-established right of a seaman to maintenance, cure, and wages").[29]

### 2. It follows that the pre-Jones Act punitive damages cases remain good law.

Almost all of the cases treated *supra* Section I-B—demonstrating that pre-Jones Act seamen could sue for punitive damages—could today be maintained as Jones Act suits.[30] The subsection just

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[29] See also *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 283-84 (1980); *Cox v. Roth*, 348 U.S. 207, 209 (1955); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939); *Beadle v. Spencer*, 298 U.S. 124, 129-30 (1936); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 377-78 (1932); *Jamison v. Encarnacion*, 281 U.S. 635, 640-41 (1930).

[30] The Jones Act would not apply in *Latchimacker* because the defendant was not the injured seaman's employer. And it would not apply in *Thompson*, which was an action for breach of contract. The seamen's actions in the rest of the cases treated in Section I-B were based on the law of maintenance and cure, intentional tort law, or unseaworthiness. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-76 (1932), held that seamen have the option of bringing an action for wrongful refusal of maintenance and cure under the Jones Act or under the general maritime law. *Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930), held that intentional torts are actionable under the Jones Act. Liability for unseaworthiness and for Jones Act negligence are often based on identical facts. See, e.g., *Miles v. Melrose*, 882 F.2d 976, 983-984 (5th Cir.

above shows that if those cases arose today, the plaintiffs would still have the right to sue for punitive damages. This Court has never suggested anything to the contrary.[31]

### B. FELA Does Not Impair Maritime Punitive Damages.

Petitioners' Brief (at 14-15, 19-20) bases its contention that Jones Act plaintiffs cannot seek punitive damages on the assertion that FELA plaintiffs cannot. The argument is wrong for two reasons. First, this Court has made it clear that FELA restrictions on plaintiffs' rights cannot displace maritime law's protections of seamen. See *Cox v. Roth*, 348 U.S. 207, 209-210 (1955) (holding that a doctrine that FELA actions do not survive the death of the tortfeasor cannot apply in Jones Act cases); *The Arizona v. Anelich*, 298 U.S. 110, 119-124

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1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

[31] William E. Aiken, Jr., Annotation, *Recovery of Punitive Damages in Actions Under Jones Act or Federal Employers' Liability Act*, 10 A.L.R.FED. 511, § 2[a] (1972), states that "the generally accepted view" is that punitive damages are recoverable in Jones Act cases. Cases supporting this view include *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1145-48 (6th Cir. 1969); *Kwak Hyung Rok v. Continental Seafoods, Inc.*, 462 F.Supp. 894, 899 (S.D.Ala. 1978), *aff'd without op.*, 614 F.2d 292 (5th Cir. 1980); *Mpiliris v. Hellenic Lines, Ltd.*, 323 F.Supp. 865, 894 (S.D.Tex. 1970), *aff'd without op.*, 440 F.2d 1163 (5th Cir. 1971); *Gunnip v. Warner Co.*, 43 F.R.D. 365, 368 (E.D.Pa. 1968); *Baptiste v. Superior Court*, 164 Cal.Rptr. 789, 795-98 (Cal. App. 1980), *cert. denied*, 449 U.S. 1124 (1981).

(1936) (holding that an assumed risk defense then available to FELA defendants did not apply in Jones Act cases); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 376-377 (1932) (holding that the Jones Act imposes broader duties on employers to care for "sick or disabled employees" than FELA).

Second, on the better view of the law FELA plaintiffs can seek punitive damages. The Senate Judiciary Committee's Report on the 1910 amendments to FELA, 45 Cong.Rec. 4048 (1910), states that when Congress enacted FELA, it meant "to extend and enlarge" the workers' remedies and not to "limit or take away ... any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred by the Act." It follows that if pre-FELA railroad workers could sue their employers for punitive damages, FELA workers can too.

In the pre-FELA jurisprudence, railroad workers so rarely won suits against employers that the issue of punitive damages never came up. However, in *Denver & Rio Grande Railway Co. v. Harris*, 122 U.S. 597 (1887), this Court upheld a punitive damages award against a railroad for shooting a rival railroad's worker. And in *Harris v. Louisville, New Orleans, & Texas Railroad Co.*, 35 F. 116 (C.C.W.D. Tenn. 1888), the court awarded punitive damages to a job applicant who was accused of theft and imprisoned by the railroad. So there is no reason to think that railroad workers would not have been eligible for punitive damages in suits against their employers had they ever managed to win a case.

Moreover, railroads in pre-FELA cases were frequently held exposed to punitive damages. *Lake Shore, supra* Section I-A-2, was a punitive damages action by a mistreated railway passenger that ultimately failed on no-vicarious-liability grounds. Mistreated passengers were awarded punitive damages against railroads in *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489 (1875); *Railroad Co. v. Brown*, 84 U.S. 445 (1873); *Cowens v. Winters*, 96 F. 929 (6th Cir. 1899); *Fell v. Northern Pac. R. Co.*, 44 F. 248 (C.C.D. N.D. 1890); *Gallena v. Hot Springs Railroad*, 13 F. 116 (C.C.E.D. Ark. 1882); and *Brown v. Memphis & C.R. Co.*, 7 F. 51 (C.C.W.D. Tenn. 1881).

Railroads' exposure to punitive damages was not limited to passenger-abuse cases. In *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885), and *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889), this Court upheld punitive damages awards against railroads for killing a mule and three pigs. In *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Quigley*, 62 U.S. 202, 214 (1858), this Court said that the railroad would have been cast with punitive damages for defaming a depot builder if "criminal indifference to civil obligations" had been shown.

William E. Aiken, Jr., Annotation, *Recovery of Punitive Damages in Actions Under Jones Act or Federal Employers' Liability Act*, 10 A.L.R.FED. 511, § 2[a] (1972), concludes that under the majority view FELA plaintiffs can sue for punitive damages. Authorities supporting this view include *Ennis v. Yazoo & M.V.R. Co.*, 79 So. 73 (Miss. 1918); *Alabama Northern Railroad Co. v. Methvin*, 64 So. 175, 176 (Ala.App. 1913); and the district court's thorough and

careful opinion in *Kozar v. Chesapeake & Ohio Railway Co.*, 320 F.Supp. 335 (W.D.Mich. 1970). *Kozar* was reversed by the Sixth Circuit, 449 F.2d 1238 (6th Cir. 1971), and that opinion is the shaky foundation of the proposition that FELA plaintiffs cannot seek punitive damages. The Sixth Circuit's *Kozar* opinion is extremely implausible in two respects. It side-steps FELA's legislative history by claiming that punitive damages are not a "remedy" (449 F.2d at 1240). And it performs a feat of judicial legerdemain on the *Vreeland* line of cases, flipping the ***pecuniary***-loss limitation on wrongful death damages into a broad new rule that all "damages recoverable under [FELA] are ***compensatory*** only" (*id.* at 1241; emphasis supplied).

## IV. DOHSA HAS NO BEARING ON THIS CASE.

The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301-30308, provides a wrongful death remedy covering fatal accidents "on the high seas beyond 3 nautical miles from the shore of the United States" (46 U.S.C. § 30302). DOHSA does not mention seamen or punitive damages, it does not apply to matters arising in territorial waters, and it has nothing to say about nonfatal accidents. Respondent's accident occurred inside the 3-mile line, and it was not fatal.

## V. SEAMEN NEED AND DESERVE THE PROTECTION OF PUNITIVE DAMAGES.

As this Court explained in *Baker*, punitive damages are justified to punish reprehensible conduct, and to teach the defendant not to do it again and others not to do it at all. *See* 128 S.Ct. at 2621.

Exxon was subjected to punitive damages in *Baker* because its conduct created a reprehensible threat to marine safety. Seamen are uniquely vulnerable to such threats; that is why they have the special protections that federal maritime law has always afforded them. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). If seamen had been injured in the *Exxon Valdez* accident, they would have needed and deserved the punitive damages remedy, at least as much so as any other marine interest.

## CONCLUSION

The Eleventh Circuit's decision should be affirmed.

Respectfully submitted,

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January 26, 2009

# AMICUS CURIAE BRIEF

No. 08-214

Supreme Court, U.S.
FILED
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In The
# Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

vs.

EDGAR L. TOWNSEND,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* CRUISE LINES INTERNATIONAL ASSOCIATION IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

The Cruise Lines International Association ("CLIA"), based in Fort Lauderdale, Florida with a satellite office in Washington D.C., is the world's largest cruise line non-profit trade association. CLIA's 24 cruise line members represent 97 percent of the cruise capacity operating in North America. CLIA's Executive Partners include over 80 strategic business allies, providing a wide array of services to the cruise industry. In addition, CLIA has nearly 16,000 travel agent professionals as members. CLIA's member lines operate over 150 ships, the largest of which carries over 1,200 crewmembers. In fact, the cruise industry is the largest employer of maritime workers of any industry operating in the U.S. CLIA's members in 2007 collectively employed over 140,000 crewmembers, a number that continues to grow each year.

Accordingly, CLIA is uniquely situated to request that this Court clarify the present confusion in the circuit courts over the availability of punitive damages upon a showing of willful failure to pay maintenance and cure and reaffirm the limitation on

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[1] *Amicus Curiae* informed counsel of record for all parties of its intention to file this brief more than 10 days prior to the date it became due. Pursuant to Rule 37.3(a), the parties' letters of consent for the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members or its counsel has made a monetary contribution to this brief, preparation, or submission.

damage recovery for an alleged willful failure to pay maintenance and cure to the crewmember's attorneys' fees incurred, as was originally intended by the Supreme Court in *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

CLIA exists, in part, to promote all measures that foster a safe, secure, and healthy cruise experience for both passengers and crew. Ensuring the health and safety of crewmembers is of utmost importance because vessel operations are dependent on the valuable services provided by many skilled employees recruited worldwide. When crewmembers are injured or become ill while in service, CLIA's cruise line members are committed to promptly providing any and all benefits dictated by the circumstances, the relevant contractual obligations (such as those contained in collective bargaining agreements), and applicable law.

Despite the cruise lines' best efforts at promoting the health and safety of its crewmembers, injuries, illnesses, and disabilities are unfortunately inevitable. The approximately 140,000 crewmembers employed by CLIA's cruise line members hail from all over the world[2] and are employed in countless capacities, from entertainers to engine room oilers. The diversity of the workforce alone presents myriad circumstances in which potential payment of maintenance and cure, or

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[2] Over 90% of the crewmembers employed by CLIA's member lines are foreign seamen.

some other form of benefits or remuneration dictated by foreign law, is triggered.

Many of the situations involve foreign crew with union contracts or government-mandated systems to which all shipowners hiring crew from those nations must adhere. Their prescribed remedies are often different than maintenance (a daily living allowance), cure (payment of "curative" medical bills), and unearned wages applicable under U.S. law. In some nations, such as the United Kingdom, there is no such concept as maintenance or cure; it is the norm in many nations to provide socialized medical benefits and wages for a specified period during the incapacity.[3] Other countries have a system of "sick wages" which continues the contractual wages while the crewman is recuperating, up to a maximum period.[4]

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[3] The U.K.'s Merchant Shipping Act 1995, Part III. Section 45 provides that a shipowner must pay the domestic and foreign medical expenses of a seaman for necessary treatment "which cannot be postponed without impairing efficiency." There is no separate maintenance requirement. Italy's "Cassa Maritima" similarly provides a no-fault death and injury cover in respect of Italian crew where the crewmember has been repatriated to Italy.

[4] For example, the employment of Filipino seamen working aboard ocean-going vessels is governed by the Philippine Overseas Employment Administration ("POEA") Standard Employment Contract which sets forth minimum terms and conditions. Under the POEA contract, a seaman is entitled to medical care until the seaman recovers, is found fit for shipboard duty, or is found to be disabled (triggering disability compensation); the seaman is also entitled to "sick wages" for

(Continued on following page)

An employer's analysis of what benefits to pay each crewman in the cruise industry is complicated not only by these choice of law issues, but also by the potential defenses reasonably available to the employer under the U.S. maintenance and cure scheme of benefits. For example, maintenance and cure are forfeited if the medical need arose from willful misconduct.[5] These benefits can also be waived if a prior material medical fact was undisclosed or misrepresented during a required pre-sign on or periodic medical fitness exam.[6]

Exposing maritime employers such as cruise lines to punitive damages for making mistakes in choosing foreign over domestic benefits schemes, or for applying the domestic scheme improperly, both frustrates the otherwise orderly administration of benefits for a huge multi-national work force, and chills the employer's implementation of otherwise

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120 days from the day the seaman either signs off the vessel due to illness or injury or is found disabled. (POEA Sections 20.B.1. and 3.)

[5] Maintenance and cure may not be owed in the case of willful misconduct such as "gross inebriation" (*Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1942)); fighting where the plaintiff was the aggressor (*Gulledge v. United States*, 337 F.Supp. 1108 (E.D.Pa. 1972), *aff'd*, 474 F.2d 1340 (3d Cir. 1973)); self-inflicted injuries (*Discovery Sun Partnership, Ltd. v. Kapsomenakis*, 2000 AMC 2402 (S.D. Fla. 2000)); and venereal disease (*Ressler v. State Marine Lines, Inc.*, 517 F.2d 579 (2d Cir. 1975), *cert. denied*, 423 U.S. 894 (1975)).

[6] *See, e.g., Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, *cert. denied*, 127 S.Ct. 382 (2006).

legitimate defenses. In addition, the disparity between the remedies afforded in most countries for routine situations involving work benefits, and those afforded in the U.S. were punitive damages allowed, would likely lead to a flood of litigation in the United States by foreign crewmembers shopping for a more generous recovery than available in any other country, especially as many foreign nations do not permit recovery of punitive damages or even enforce U.S. awards.[7]

The cruise industry substantially benefits the U.S. economy.[8] A uniform and predictable rule that punitive damages are not available for a failure to pay maintenance and cure, will allow employers to understand their liabilities under U.S. law, assess with some degree of reliability the consequences of their often-difficult benefits determinations, reduce unnecessary litigation, and enable them to continue to offer affordable and diverse vacation choices for the

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[7] *See, e.g.*, 2 L. Schlueter, Punitive Damages §§ 22.2(A)-(C), (E) (5th ed. 2005); Gotanda, Charting Developments Concerning Punitive Damages: Is the Tide Changing? 45 Colum. J. Transnat'l L. 507, 514, 518, 528 (2007).

[8] A 2007 annual Business Research Economic Advisors ("BREA") study found that the total economic benefit of the cruise industry in the United States is $38 billion and that cruise industry activity generated $15.4 billion in wages and 354,000 jobs for U.S. employees alone.

increasing number of passengers,[9] thereby benefitting both the U.S. job market and economy.

## SUMMARY OF ARGUMENT

In 1962, the U.S. Supreme Court decided *Vaughan v. Atkinson*, 369 U.S. 527 (1962). The majority in *Vaughan* held a seaman was entitled to his attorneys' fees for bringing suit to recover maintenance (daily stipend) and cure (medical expenses) which were callously, recalcitrantly, willfully, and persistently denied by the shipowner. *Id.* Forty-five years later, the Eleventh Circuit decided in *Atlantic Sounding Co., Inc., et al. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007) that punitive damages, in addition to attorneys' fees, can be sought by seamen who allege a willful and/or arbitrary failure of the shipowner to pay these U.S.-fashioned remedies. *Townsend*, and the intervening decisions it relied upon, have distorted the majority's holding in *Vaughan* as creating a punitive damage remedy for failure to pay

[9] Over the past 10 years, the industry has responded to extensive market and consumer research that has guided the addition of new destinations, new ship design concepts, new onboard/on-shore activities, new themes and new cruise lengths to reflect the changing vacation patterns of today's market. Over the next three years, nearly 51 million North Americans (from the U.S. and Canada) indicate an interest to cruise with 33.7 million stating a strong intent to act on that interest. By maintaining historical occupancy levels, the cruise industry will welcome 12.8 million guests in 2008.

maintenance and cure. The majority opinion in *Vaughan* never mentioned the words "punitive" or "exemplary" for good reason – the award of attorneys' fees was intended to compensate the plaintiff, not to deter or punish the defendant. Additionally, the language selected by *Vaughan*'s majority to describe the conduct required to impose an award of attorneys' fees (*i.e.*, "callous," "recalcitrant," "willful and persistent") is not indicative of an intention to award punitive damages which are generally reserved for extreme cases of malicious and oppressive conduct.

Moreover, attorneys' fees are, by their very nature, compensatory. It is therefore no surprise that subsequent Supreme Court cases discussing *Vaughan* have interpreted its award of attorneys' fees as a compensatory remedy. Courts throughout the U.S. also generally hold that attorneys' fees are compensatory by nature, not punitive. As a matter of practical application, an award of attorneys' fees is substantively and procedurally very different from an award of punitive damages. For example, a finder of fact in awarding punitive damages typically takes into consideration factors such as the reprehensibility of the defendant's conduct and the defendant's financial worth in assessing an appropriate punitive damage award. On the contrary, an award of attorneys' fees is based only on the reasonable hours worked by the attorney for the crewmember at that attorney's reasonable rate. The assessment of attorneys' fees to the crewmember is blind to the conduct and financial

worth of the defendant. Attorneys' fees and punitive damages are the proverbial "apples" and "oranges."

Nevertheless, lower courts have relied on language in *Vaughan*'s dissent, which improperly characterized the majority's award of counsel fees as "exemplary," as creating a punitive damage remedy.[10] These same courts have simultaneously diluted the standard of conduct necessary to justify such an award to a mere "arbitrary" failure to pay maintenance and cure. This has resulted in a complete distortion of *Vaughan* whereby some courts are now affording a punitive remedy never intended by *Vaughan* for conduct even less odious than that required by *Vaughan*. This Court now has an opportunity to reaffirm the original intent of *Vaughan*, which was to compensate seamen with a non-punitive award of attorneys' fees where appropriate.

Furthermore, permitting punitive damages in the maintenance and cure context will undoubtedly result

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[10] Justice Stewart, with Justice Harlan joining, stated: " . . . [I]f the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages. . . . While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made. [Internal citations omitted.]" 369 U.S. at 540. Notably, the dissent used the language "wanton and intentional" to describe the level of conduct necessary to impose punitive damages; this is not the language used by the majority.

in transoceanic forum shopping, given the obvious worldwide predominance of foreign seamen over U.S. seamen.[11] The specter of a punitive damage award encourages foreign crewmembers to bring suit in the United States, even when the U.S. has no real connection to or interest in the parties or issues involved. Given the general unavailability of punitive damages in foreign countries from which a large number of cruise line employees hail,[12] the *Townsend* decision shows no concern about making U.S. courts the "courthouse of the world."

Finally, awarding punitive damages for a willful failure to pay maintenance and cure has a negative, chilling effect on the assertion by maritime employers of valid defenses to maintenance and cure claims such as the crewmember's willful misconduct or failure to disclose a pre-existing condition.[13] With the threat of a punitive damage award looming over a maritime employer for a mere "willful" failure to pay maintenance and cure, many an inappropriate claim will be paid because the very assertion of a defense will provide the "willfulness" upon which a

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[11] According to a 2006 study by the Maritime Administration ("MARAD") (an agency within the Department of Transportation), the number of U.S. water transportation workers employed in all capacities is approximately 60,000. The number of foreign seamen working aboard CLIA's cruise lines' vessels is more than double the number of all U.S. seamen combined. *See* MARAD Policy Paper, www.marad.dot.gov/documents/CabotageLaws.pdf.

[12] *See* footnote 7, *supra*.

[13] *See* footnotes 5 and 6, *supra*.

crewmember will seek to base a punitive damage award. In an effort to avoid the risk of punitive damages, maritime employers will instead pay maintenance and cure claims which might otherwise be unjust and appropriately denied, thus unnecessarily increasing the cost of doing business – a cost which will ultimately be passed along to consumers. For all of these reasons, the Eleventh Circuit's decision in *Townsend* should be reversed.

## ARGUMENT

### I. THE AWARD OF ATTORNEYS' FEES FOR A WILLFUL FAILURE TO PAY MAINTENANCE AND CURE IN *VAUGHAN V. ATKINSON* DOES NOT GIVE RISE TO AN AWARD OF PUNITIVE DAMAGES.

The genesis of the issue in this case – whether or not punitive damages are awardable against a shipowner for a willful failure to pay maintenance and cure – can be traced back to the U.S. Supreme Court decision of *Vaughan v. Atkinson*, 369 U.S. 527 (1962). In *Vaughan*, the majority awarded attorneys' fees to a seaman upon a showing that his maintenance and cure were callously, recalcitrantly, willfully, and persistently denied by the shipowner. *Id.* at 530-531. In deciding the present matter of *Townsend*, the Eleventh Circuit, citing its earlier decision in *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), stated "that it was unclear whether the *Vaughan* majority regarded attorney's fees as an item of

compensatory damages or as a punitive measure." *Townsend*, *supra*, 496 F.3d at 1285, footnote 2. Other federal circuit courts have professed similar confusion. Some courts have held that *Vaughan*'s award of attorneys' fees was compensatory in nature. *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279, 1283 (5th Cir. 1994), *rev'd in part on reh'g*, 59 F.3d 1496 (1995), *cert. denied*, 516 U.S. 1046 (1996). Some courts have held that *Vaughan* permits recovery of *attorneys' fees only* as an item of punitive damages. *See, e.g., Kraljic v. Berman Enter.*, 575 F.2d 412, 415 (2d Cir. 1978). Other courts, like *Townsend*, have held that punitive damages *in addition to attorneys' fees* are available in cases of willful failure to pay maintenance and cure. *See, e.g., Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973).

Despite the various interpretations of *Vaughan*, its holding is not unclear. A review of the majority opinion in *Vaughan*, in addition to a general examination and comparison of punitive damages and attorneys' fees, leads to one conclusion – *Vaughan* awarded attorneys' fees to compensate the plaintiff seaman and did not intend to create a punitive damage remedy. Accordingly, the *Townsend* matter now gives this Court the opportunity to "right the ship" and reestablish a consistent application of *Vaughan*'s holding that the measure of damages for a callous, recalcitrant, willful, and persistent failure to pay maintenance and cure is compensatory attorneys' fees.

## A. PUNITIVE DAMAGES ARE NOT COMPENSATORY IN NATURE; THEY ARE DESIGNED TO DETER AND PUNISH.

An examination of the purpose of punitive damages is essential at the outset. Fortunately, this Court recently undertook this examination in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008). In *Baker*, this Court reviewed case law and jury instructions from various U.S. jurisdictions[14] and concluded that the purpose of punitive damages is not

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[14] In particular, this Court cited: "Cal. Jury Instr., Civil, No. 14.72.2 (2008) ("You must now determine whether you should award punitive damages against defendant[s] . . . for the sake of example and by way of punishment"); N. Y. Pattern Jury Instr., Civil, No. 2:278 (2007) ("The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . . and thereby to discourage the defendant . . . from acting in a similar way in the future")" and "*Moskovitz v. Mount Sinai Medical Center*, 69 Ohio St. 3d 638, 651, 1994 Ohio 324, 635 N.E.2d 331, 343 (1994) ("The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct"); *Hamilton Development Co. v. Broad Rock Club, Inc.*, 248 Va. 40, 45, 445 S. E. 2d 140, 143, 10 Va. Law Rep. 1449 (1994) (same); *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 414, 563 N.E.2d 397, 401, 150 Ill. Dec. 510 (1990) (same); *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989) (same); *Masaki v. General Motors Corp.*, 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) (same); *see also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (punitive damages are "intended to punish the defendant and to deter future wrongdoing"); *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) ("[P]unitive damages . . . are aimed at deterrence and retribution"); 4 Restatement § 908, Comment a." 128 S.Ct. at 2621 and footnote 9.

to compensate the plaintiff, but to deter future misconduct and punish the defendant. This Court stated:

> Regardless of the alternative rationales over the years, ***the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct***. [Footnote omitted.] This consensus informs the doctrine in most modern American jurisdictions, where juries are customarily instructed on twin goals of punitive awards. [Emphasis added.] 128 S.Ct. at 2621.

Accepting this consensus rationale for awarding punitive damages, the analysis turns to the language of *Vaughan* to determine whether the majority intended to compensate the plaintiff or punish and deter the defendant.

## B. THE MAJORITY IN *VAUGHAN* INTENDED ATTORNEYS' FEES TO COMPENSATE THE PLAINTIFF, NOT TO DETER OR PUNISH THE DEFENDANT.

### 1. The *Vaughan* Majority Opinion Clearly Expressed Its Intent to Compensate the Plaintiff.

In *Vaughan*, a seaman was discharged from service aboard a vessel upon the end of a voyage; shortly thereafter, he was diagnosed with tuberculosis at a shoreside hospital. 369 U.S. at 528. The seaman sought maintenance and cure benefits from

the shipowner for the period he was in treatment and recuperating. *Id.* The shipowner denied the seaman's claim for maintenance and cure after its investigation which was limited to interrogation of the ship's Master and Chief Engineer, who both stated the seaman never complained of any illness during his service aboard the vessel. *Id.*

The majority in *Vaughan* found that the shipowner's failure to pay maintenance and cure was "callous," "recalcitrant," "willful and persistent." *Id.* at 530-531. The Court then awarded the seaman his attorneys' fees for bringing suit to recover his maintenance and cure benefits. However, it is evident from the majority's opinion that attorneys' fees were designed to *compensate* the plaintiff seaman, not deter or punish the defendant shipowner. The Court held, "As a result of [the shipowner's] recalcitrance, [the seaman] was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. . . . It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." *Id.* The Court's reasoning centered on making whole (*i.e.*, compensating) the seaman for being forced into hiring an attorney to recover benefits owed to him. The attorneys' fees were awarded as compensation for "damages suffered" by the seaman, not to deter or punish the shipowner.

Nowhere does the *Vaughan* majority mention "punitive" or "exemplary" damages in its opinion. Moreover, the cases cited by *Vaughan* for the proposition that a crewmember is entitled to attorneys' fees

are not punitive damages cases. In particular, *Vaughan* relied upon the decision in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932) wherein this Court held: "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only ***necessary expenses***, but also compensation for the hurt. [Emphasis added.]" The *Vaughan* majority awarded attorneys' fees as part of the "necessary expenses" incurred by the seaman, not as an item of punitive damages.

### 2. The Language Used by the *Vaughan* Majority to Describe Conduct Warranting Imposition of Attorneys' Fees Is Not Indicative of Punitive Damages.

Additionally, the majority's language of "callous," "recalcitrant," "willful and persistent" is not indicative of an intention to award punitive damages. As recently recognized by this Court in its *Baker* decision:

> The prevailing rule in American courts also limits punitive damages to cases of . . . "enormity," where a defendant's conduct is "outrageous," 4 Restatement § 908(2), owing to "gross negligence," "willful, wanton, and reckless indifference for the rights of others," or behavior even more deplorable, 1 Schlueter § 9.3(A). 10 [Citation]

In *Vaughan*, it is to be assumed the majority carefully selected the words "callous," "recalcitrant," "willful and persistent" to define the type of conduct necessary to award attorneys' fees. However, these words fall short of describing the odious behavior punitive damages are designed to deter and punish.

Merriam-Webster pertinently defines the adjective "callous" as "a: feeling no emotion; b: feeling or showing no sympathy for others"; "Recalcitrant" is defined as "1: obstinately defiant of authority or restraint; 2 a: difficult to manage or operate; b: not responsive to treatment; c: resistant"; "Willful" is defined as "done deliberately; intentional"; and "persistent" is defined as "continuing or inclined to persist in a course." None of these words smack of the "enormity" or "outrageousness" required to support an award of punitive damages. Punitive damages are typically awarded upon a showing of "malicious," "outrageous," "wanton," "oppressive," or "fraudulent" behavior[15] over and above a mere lack of sympathy or recalcitrance. Even the dissent in *Vaughan* stated that exemplary damages are awardable for "a *wanton and intentional* disregard of the legal rights of the seaman. [Emphasis added.]" 369 U.S. at 540. Notably, the majority did not use this phrasing.

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[15] *See, e.g., BMW of N. Am. v. Gore*, 517 U.S. 559, 588-589 (1996) for its discussion of the Alabama punitive damages statute which requires "oppression, fraud, wantonness, or malice."

Punitive damage statutes are designed to deter and punish actors for behavior that has, at a minimum, some degree of subjective intent to injure another. The *Vaughan* majority chose not to use any of the traditional words associated with punitive damage statutes. The logical conclusion is that *Vaughan* did not intend the award of attorneys' fees to serve as a punitive measure.

### C. ATTORNEYS' FEES ARE NOT PUNITIVE DAMAGES.

The Supreme Court itself subsequently interpreted *Vaughan*'s award of attorneys' fees as compensatory. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967),[16] the Court cited *Vaughan* for the proposition that "an admiralty plaintiff may be awarded counsel fees ***as an item of compensatory damages*** (not as a separate cost to be taxed). [Emphasis added.]" As noted by petitioners in their Brief on the Merits, this Court has cited *Vaughan* at least six other times for the proposition that it stands for nothing more than an exception to the "American rule" that parties are to bear their own attorneys' fees.[17] The Fifth Circuit also correctly

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[16] Superseded by statute on other grounds; *see Decorations for Generations, Inc. v. Home Depot USA, Inc.*, 2003 U.S. Dist. LEXIS 26608 (E.D.Cal. Sept. 19, 2003).

[17] *See Summit Valley Indus., Inc. v. Local 112*, 456 U.S. 717, 721 (1982); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Runyon v. McCrary*, 427 U.S. 160, 183 (1976); *Alyeska*

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concluded that *Vaughan*'s award of attorneys' fees was clearly compensatory and non-punitive. The Fifth Circuit in *Guevara, supra*, held:

> The Vaughan award was clearly not a punitive damages award in the tort sense of punishing the underlying conduct that gave rise to the litigation, and the developing case law does not support such a position.
>
> Simply put, all we can confidently say about Vaughan is that it entitles an injured seaman to recover attorney's fees – perhaps as part of compensatory damages – when his employer willfully fails to pay maintenance and cure. We cannot definitively conclude, however, that Vaughan establishes any broader principle to support Holmes's rule that tort-like punitive damages, not limited to attorney's fees, are available in cases of willful nonpayment of maintenance and cure.

59 F.3d at 1503.

The circuits which have interpreted *Vaughan* as permitting punitive damages focus on the majority's discussion of the defendant's conduct as somehow justifying an award of punitive damages. In *Kraljic v. Berman Enter., supra*, 575 F.2d at 415, the Second Circuit recognized that *Vaughan*'s award of attorneys' fees appeared to be compensatory as a "necessary

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*Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258 (1975); *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973).

expense," but found it "difficult to understand the Court's emphasis on the malice of the shipowner"[18] and ultimately concluded that the award of attorneys' fees must therefore have been punitive in nature. However, the *Vaughan* court's discussion of the shipowner's conduct does not transform the award of attorneys' fees into punitive damages. For example, in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004), the majority held in a willful patent infringement case:

> The appellants also argue that the award of attorney fees is a matter of punitive damages, and is therefore improper. Precedent and statute do not support this position. 35 U.S.C. § 285 provides that "the court in exceptional cases may award reasonable attorney fees to the prevailing party"; and the court has confirmed that a finding of willful infringement may qualify a case as exceptional under § 285. [Internal citation omitted.] That there were not actual damages does not render the award of attorney fees punitive. ***Attorney fees are compensatory***, and may provide a fair remedy in appropriate cases. Upon a finding of willful infringement, the award of attorney fees is within the district court's sound discretion.

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[18] The word "malice" was not used by the *Vaughan* majority.

The dissent in *Knorr-Bremse* agreed with the majority in pertinent part, stating:

> This case, of course, does not involve an award of enhanced damages, but rather an award of attorney fees based on a willfulness finding. ***The majority correctly rejects the contention that an award of attorney fees pursuant to 35 U.S.C. § 285 is a form of punitive damages. . . . While attorney fees are not punitive damages***, our case law makes clear that, where attorney fees are awarded based on a willfulness finding, the same standard for willfulness applies to both enhancement and attorney fees. [Internal citation omitted.] [Emphasis added.] *Id.* at 1348.

In other words, a court's examination of whether a defendant's willfulness justifies an award of attorneys' fees within its discretion does not mean the award of such fees is punitive. Similarly, the *Vaughan* court's holding that the defendant's "callous," "recalcitrant," "willful and persistent" conduct justified an award of attorneys' fees does not render its award of attorneys' fees punitive.

State courts have similarly found that even though awards of attorneys' fees may have a punitive effect, they are compensatory in nature. In *City of Warner Robins v. Holt*, 220 Ga. App. 794, 795 (Ga. Ct. App. 1996), the court held:

> Though awards of litigation expenses and attorney fees may often have a somewhat

> punitive effect on the party against whom they are awarded, to punish or penalize is not their purpose. Rather, in those limited circumstances under which such awards are authorized by law, ***the purpose is to compensate an injured party***, in order that such parties are not further injured by the cost incurred as a result of the necessity of seeking legal redress for their legitimate grievances. [Emphasis added.]

In *H & H Subs v. Lim*, 223 Ga. App. 656, 660-661 (Ga. App. Ct. 1996), the court held, "In short, litigation expenses and attorney fees are not punitive damages." *See also Wilhelm v. Barnes*, 1982 Ohio App. LEXIS 13779, *19 (Ohio Ct. App. 1982) ("Attorneys fees are not punitive damages. . . .")

### D. AN AWARD OF ATTORNEYS' FEES IS SUBSTANTIVELY AND PROCEDURALLY DIFFERENT FROM AN AWARD OF PUNITIVE DAMAGES.

As a practical matter, an award of attorneys' fees bears no resemblance to the typical assessment and award of punitive damages. To the extent punitive damages are designed to punish, and thus deter, future conduct, certain factors are typically considered in assessing such an award and later determining whether such award is inadequate or excessive. In *BMW of N. Am. v. Gore, supra*, 517 U.S. at 605, this Court identified three guideposts for reviewing an award of punitive damages, namely, "the degree of

reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." The "financial position" of a defendant is also "typically considered in assessing punitive damages." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462, footnote 28 (1993). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (wherein this Court approved the consideration of a defendant's financial worth as one of several factors in assessing punitive damages.) It is within the discretion of the finder of fact to both: (1) award punitive damages; and (2) determine the appropriate amount of such punitive damages based on the typical factors identified above. "'[Punitive] damages are typically determined by reference to factors such as the character of the wrong, the amount necessary to 'punish' the defendant . . . and the jury has a great deal of discretion in deciding both whether such damages should be awarded and the amount of the punitive award.' *See, e.g.*, C. McCormick, Law of Damages § 85 (1935)." *Carlson v. Green*, 446 U.S. 14, 47-48 (1980).

However, none of these typical factors used in assessing a punitive damage award are accounted for in awarding a plaintiff attorneys' fees for bringing suit. The amount of reasonable attorneys' fees is based solely on the reasonable amount of time spent by the plaintiff's attorney multiplied by the reasonable

hourly rate of such attorney. The computation does not account for the "reprehensibility" of the defendant's conduct; it is not based on comparable civil penalties in similar cases; it does not account for the financial worth of the defendant. A finder of fact does not consider any of these various factors when damages are limited to attorneys' fees. The conclusion is therefore inescapable that *Vaughan*, in awarding attorneys' fees to the plaintiff, was not awarding punitive damages and did not intend to do so. As the result of circuit courts misinterpreting *Vaughan*'s award of attorneys' fees as punitive damages, it is now necessary for this Court to reestablish the intention of *Vaughan*'s majority and restore a uniform rule that the measure of damages for a callous, recalcitrant, willful, and/or persistent failure to pay maintenance and cure is an award of compensatory attorneys' fees.

### E. CIRCUIT COURTS HAVE ADDITIONALLY DILUTED THE CONDUCT NECESSARY TO AWARD ATTORNEYS' FEES UNDER *VAUGHAN*.

The *Townsend* case also gives this Court the opportunity to curb the further dilution by the circuit courts of the standard necessary to award attorneys' fees under *Vaughan*. In *Vaughan*, this Court noted the employers in that case were:

> . . . *callous* in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a

> result of that *recalcitrance*, libellant was forced to hire a lawyer and go to court to get what was plainly owed him. . . . The default was *willful and persistent*. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one. [Emphasis added.]

369 U.S. at 530-531.

However, subsequent circuit court decisions diluted the *Vaughan* standard to allow an award of punitive damages for the "arbitrary" failure to pay maintenance and cure. In 1984 (before overruling its precedent awarding punitive damages in maintenance and cure cases), the Fifth Circuit cited *Vaughan* for the proposition that "an employer's *willful and arbitrary* refusal to pay maintenance and cure gives rise to a claim for damages in the form of attorneys' fees in addition to the claim for general damages. [Emphasis added.]" *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984). Other courts subsequently adopted this new standard. For example, the Fourth Circuit cited *Holmes* and noted, "courts have long awarded punitive damages to seamen where maintenance and cure benefits have been *arbitrarily and willfully* denied. [Emphasis added.]" *Manuel v. United States*, 50 F.3d 1253, 1260 (4th Cir. 1995).

The Eleventh Circuit's decision in *Hines*, which the *Townsend* court held was binding, also exemplifies the diluted standard for circumstances justifying awards of punitive damages:

> Although there is no bright line to measure arbitrary conduct, the Fifth Circuit has identified examples of willfulness meriting punitive damages and counsel fees [including] . . . laxness in investigating a claim. . . .

*Hines*, *supra*, 820 F.2d at 1190. Between *Vaughan* and *Hines*, the degree of odious conduct upon which an award of attorneys' fees could be awarded was lowered from a callous, recalcitrant, willful, and persistent failure to investigate a crewmember's maintenance and cure to a mere arbitrary "laxness in investigating a claim." The new standard for imposing punitive damages is even less than the "wanton and intentional disregard" language stated in the *Vaughan* dissent. This reflects the judicial confusion not only about whether *Vaughan*'s grant of attorneys' fees was compensatory or punitive in nature, but also the type of conduct upon which an award can be based. Although it is clear that attorneys' fees are compensatory in nature, this Court has the opportunity in *Townsend* to reestablish the standard of conduct originally set forth in *Vaughan* for recovery of attorneys' fees.

## II. ALLOWING PUNITIVE DAMAGES FOR A WILLFUL FAILURE TO PAY MAINTENANCE AND CURE WILL ENCOURAGE "THE MISCHIEF OF FORUM SHOPPING" AND INCREASE LITIGATION OF CASES IMPROPERLY BROUGHT IN U.S. COURTS.

As long as punitive damages over and above attorneys' fees are available for an alleged willful failure to pay maintenance and cure, a crewmember with a maintenance and cure claim is encouraged to bring suit in the U.S., regardless whether the case is more appropriately brought, or more convenient, in a foreign jurisdiction. This Court has addressed the menace of transoceanic forum shopping. In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court reversed the previous admiralty rule against "divided damages,"[19] finding: "Indeed, the United States is now virtually alone among the world's major maritime nations in not adhering to the Convention with its rule of proportional fault – a fact that encourages transoceanic forum shopping." *Id.* at 403-404. [Footnote omitted.]

The threat of transoceanic forum shopping is real. Over 90% of the approximately 140,000 crewmembers employed by CLIA's member lines alone are foreign seamen. This percentage continues to grow.

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[19] The "divided damages" rule, typically in collision cases, required the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of fault may have been. *Id.* at 397.

These seamen are employed in countless capacities, from entertainers to engine room oilers, and work aboard vessels sailing all over the world, many times with little to no contact with the U.S. The sheer number of crewmembers and diversity of the workforce presents myriad circumstances in which potential payment of maintenance and cure, or some other form of benefits or remuneration dictated by foreign law, is triggered. Accordingly, the opportunity to benefit from generous provisions of U.S. law continually occurs and presents a constant threat of forum shopping.

To combat forum shopping by foreign plaintiffs improperly bringing suit in the United States solely to benefit from the more generous relief provided by U.S. courts than their home countries, courts have granted dismissal on the grounds of *forum non conveniens*. The Eleventh Circuit upheld such a dismissal in *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (11th Cir. 1985), describing the plaintiff as "the archetypal foreign plaintiff bringing her foreign tort claim to American courts to secure relief more generous than she would get under the law of her homeland [Greece]." *Id.* at 1520.

Should this Court decide that punitive damages are available for a willful failure to pay maintenance and cure, foreign plaintiffs will continue to bring suit in the U.S., even where there is little connection to or interest in the United States resolving the foreign

dispute, because punitive damages are widely disapproved and not recognized in most of the world.[20] Foreign crewmembers injured abroad continue to file suit in the U.S. in light of the specter of punitive damages even though, under *Vaughan,* such damages are not even available. The *Townsend* case presents a timely opportunity for this Court to reestablish *Vaughan*'s holding and discourage transoceanic forum shopping.

## III. ALLOWING PUNITIVE DAMAGES FOR A WILLFUL FAILURE TO PAY MAINTENANCE AND CURE WILL HAVE A CHILLING EFFECT ON A SHIPOWNER'S ABILITY TO DEFEND AGAINST INAPPROPRIATE MAINTENANCE AND CURE CLAIMS.

It is an ancient duty of a shipowner to provide maintenance and cure to a seaman who becomes ill or injured while in the service of the vessel. *See Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938). However, the duty to provide maintenance and cure is not without defenses. For example, maintenance and cure

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[20] This Court, citing to an international law scholar, recently noted that "punitive damages are higher and more frequent in the United States than they are anywhere else." *Baker, supra*, 128 S.Ct. at 2623. *See also* footnote 7. The Court described the extremely limited circumstances in which punitive damages are awardable in the U.K. and the absence of punitive damages awards in countries like Italy, France, Germany, Austria, Switzerland, and Japan. *Id.*

may not be owed in the case of willful disobedience of a lawful order (*Van Dinter v. American S.S. Co.*, 387 F.Supp. 989 (E.D.N.Y. 1984); willful misconduct such as "gross inebriation" (*Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1942)); fighting where the plaintiff was the aggressor (*Gulledge v. United States*, 337 F.Supp. 1108 (E.D.Pa. 1972), *aff'd*, 474 F.2d 1340 (3d Cir. 1973)); self-inflicted injuries (*Discovery Sun Partnership, Ltd. v. Kapsomenakis*, 2000 AMC 2402 (S.D. Fla. 2000)); and venereal disease (*Ressler v. State Marine Lines, Inc.*, 517 F.2d 579 (2d Cir. 1975), *cert. denied*, 423 U.S. 894 (1975)). A common issue arising in the cruise line industry is a crew member's waiver of the right to maintenance and cure where the crew member failed to disclose prior material medical facts or made misrepresentations during a required pre-sign on or periodic medical fitness exam. *See, e.g., Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, *cert. denied*, 127 S.Ct. 382 (2006). A failure to follow physician recommendations can also be a defense to continued maintenance and cure. *See Diddlebrook v. Alcoa S.S. Co.*, 234 F.Supp. 811 (E.D.Pa. 1964).

However, a rule permitting punitive damages for a mere "willful"[21] failure to pay maintenance and cure has a chilling effect on the assertion of such valid defenses. For example, if a cruise line has evidence that a crew member's injury was as the result of

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[21] *I.e.*, the shipowner "intended" his conduct, even after a fair investigation.

willful misconduct (likely a factual question), it can rightfully deny maintenance and cure benefits and might *willfully* do so, without any intent to harm the crewmember. If the injured crewmember sues for recovery of maintenance and cure benefits, such crew member will argue that the withholding of maintenance and cure was willful and thus seek recovery of punitive damages. Despite a valid defense to the crewmember's claim, the cruise line is therefore discouraged from raising such defense with the threat of punitive damages being imposed on the slight standard of willful denial. As a result, maritime employers will choose to pay maintenance and cure claims even where valid defenses exist to avoid the risk of a punitive damage award. This chilling effect results in a higher number of uncontested maintenance and cure claims, and ultimately, increased but unjustified costs to cruise line consumers.

On the other hand, this Court must also reestablish the degree of culpable conduct required by *Vaughan* for even an award of attorneys' fees. That a shipowner "willfully" or "intentionally" denied maintenance and cure benefits should not be enough to award attorneys' fees when the shipowner was merely exercising its right to dispute an award of benefits based on a potentially available defense. Rather, as intended in *Vaughan*, the shipowner must be "callous," "recalcitrant," or "willful and persistent" to warrant even an award of attorneys' fees.

## CONCLUSION

This Court recently spoke to its responsibility to clarify confusion generated by its judicially-created law. In limiting punitive damages to a 1:1 ratio in *Baker*, this Court noted that the remedy of punitive damages "is itself entirely a judicial creation" and concluded that it "may not slough off [its] responsibilities for common law remedies because Congress has not made a first move. . . ." 128 S.Ct. at 2630. Although the *Vaughan* decision clearly awarded attorneys' fees as a compensatory measure, the circuit courts have nevertheless become confused, primarily as the result of the dissent's characterization of the majority's award as "exemplary." In granting certiorari in *Townsend*, this Court can now exercise its authority to undo the circuit courts' distortion of *Vaughan* and reestablish the intention of the *Vaughan* majority which was to award attorneys' fees as a compensatory measure upon a callous, recalcitrant, willful, and persistent failure to pay maintenance and cure.

As maritime law must be fashioned in light of both its national and international ramifications, this Court should consider the effect of permitting the award of punitive damages in maintenance and cure cases. Primarily, such a rule will entice foreign seamen with no connection to the U.S. to bring suit here to benefit from the U.S.'s generous laws, and in effect, making the U.S. the courthouse of the world for all injured seamen. Such a rule equally discourages maritime employers from raising valid defenses to

maintenance and cure claims, thus increasing the costs of business which are ultimately passed along to consumers.

For the foregoing reasons, the decision of the Eleventh Circuit should be reversed with instructions that respondent's claim for punitive damages be dismissed.

DATED: December 26, 2008.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 08-214

# In The
# Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

v.

EDGAR L. TOWNSEND,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF PORT MINISTRIES INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

May a seaman recover punitive damages for the Shipowner's failure to pay maintenance and cure?

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# BRIEF OF PORT MINISTRIES INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

## INTEREST OF *AMICUS CURIAE*[1]

Port Ministries International ("PMI") has a great interest in protecting seafarers. PMI is a thirty-six (36) member association of seafarer's ministries and individuals serving international seafarers with locations in many ports in the United States. PMI's purpose is evangelism and to meet the physical, emotional and spiritual needs of seafarers.[2]

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[1] Pursuant to Rule 37.6, *Amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or its counsel make a monetary contribution to its preparation. Letters on file with the Clerk show that all parties consent to its submission.

[2] PMI's members meet the needs of seafarers by providing the following: free transportation to locations near the ports; serving free home cooked meals; providing recreation and relaxation activities such as games, television and reading material; providing free used clothes; providing free internet and e-mail and low cost phone cards so the seafarers can communicate with their families and friends so far away; bringing cell phones to ships for seafarers to use when they have no access ashore; connecting with the seafarers emotionally by spending time talking with and getting to know them; having chapel services for the seafarers and onboard ships by request; providing free Bibles, Jesus Christ videos and other material in over 50 languages; providing free and confidential counseling; sharing the gospel of Jesus Christ; and encouraging Christian seafarers in their walk with the Lord.

PMI's presence can be found across the United States[3].

PMI is fearful of an alarming trend. The plight of seafarers is getting worse day by day. Seafarers' ability to access the U.S. courts and enforce their rights has been severely limited by flags of convenience, sham unions and foreign arbitration clauses. Taking away the availability of punitive damages in maintenance and cure cases in light of the other assaults on seafarer's access to the U.S. system, would be one more step towards making it increasingly difficult, if not impossible, for seafarers to obtain justice.

The conditions and treatment of seafarers remain dangerous, grim and wholly counter to American ideals of morality and justice. In an interdependent world, where commerce between nations is the lifeline of civilization, seafarers are the vital component to the successful movement of goods across vast oceans. If trade is the heart that pumps life into world markets and shipping the arteries, seafarers are the nutrients that keep both working. They travel the globe with everything needed, from bananas, oil,

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[3] The seafarers ministries are located in the following states and ports: Florida: Port Manatee, Cape Canaveral, Tampa, Jacksonville; Alabama: Mobile; Maryland: Baltimore; Indiana: Burns Harbor; Louisiana: New Orleans, Reserve; Mississippi: Gulfport, Pascagoula; Virginia: Portsmouth; South Carolina: Charleston, Georgetown; Texas: Freeport; Washington: Tacoma; Pennsylvania: Philadelphia.

gas and building materials to cloth, grain and frozen meat. They are also an invisible and vulnerable labor force.

Despite their importance, the combination of flags of convenience, sham unions, arbitration and the disallowance of punitive damages is a road map for shipowners to get away with abusing seafarers and to save money at the same time. After being abandoned by shipowners, sick, hungry, destitute seafarers are seeking help because the shipowners have not lived up to their maintenance and cure obligations. PMI is doing all that it can, but PMI does not have the resources to do all that is necessary to protect the seafarers.

PMI members have seen the suffering of seafarers who are refused maintenance and cure benefits. When a shipowner failed to adequately provide for a seriously injured crew member, a volunteer from a PMI seafarer's ministry took him in and provided him with food and lodging while on shore recovering. The threat of punitive damages is an important deterrent to a shipowner's willful refusal to provide a seafarer with maintenance and cure benefits. Removing that threat is a green light to shipowners to engage in an economic analysis pitting the obligation to provide maintenance and cure against the cost savings to them to not provide these benefits. It is only punitive damages that change the analysis because the shipowner can never be sure what improper conduct will cost them. Without the threat of punitive damages, the shipowner can quickly figure out that by denying

maintenance and cure to their injured seafarers, they have very little to lose and a lot to gain by denying the benefits legally due to seafarers.

## SUMMARY OF ARGUMENT

Petitioners seek to change hundreds of years of jurisprudence and claim it is an "outdated stereotype that seafarer are 'wards of admiralty.'"[4] This could not be farther from the truth. There is nothing "outdated" about the long hours, low pay, insecurity, fear and exploitation that international seafarers face on a daily basis. Access to the United States Courts has become increasingly difficult for seafarers. Foreign arbitration clauses, sham unions and flags of convenience are effectively denying access to courts with an illusory remedy of arbitration that is incapable of being performed. The arbitration clauses signed by seaman, with no idea what they are signing, sends them to foreign locations that the seafarer cannot afford to get to, cannot afford to live in, cannot afford to hire an attorney and cannot afford to pay the associated costs. These arbitration clauses are clearly designed to make it economically impossible for a seafarer to seek enforcement of their legal rights. The right to maintenance and cure is becoming illusory as well. Without the threat of punitive damages, maintenance and cure will become even more likely to be

[4] *See* Petitioners' Brief On The Merits, page 28, footnote 6.

an illusory remedy in light of the other assaults on seafarer's access to the legal system.

Punitive damages are one of the few weapons available to seafarers to get shipowners to do what they are supposed to do and without such a threat, things will get worse for seafarers. PMI is fearful that there will be a dramatic increase of seafarers not getting medical care from shipowners. This Honorable Court's ruling in this matter will decide whether or not injured or sick seafarers can be discarded at will. It is only the threat of punitive damages that will keep the shipowners in line and convince them to follow the law. The failure to recognize this fact will have dangerous repercussions.

## ARGUMENT

### I. THE LETHAL COMBINATION OF ARBITRAL PROVISIONS, SHAM UNIONS, FLAGS OF CONVENIENCE AND THE REMOVAL OF PUNITIVE DAMAGES WILL EFFECTIVELY CLOSE THE COURTHOUSE DOORS TO SEAFARERS, THE WARDS OF ADMIRALTY.

This Court should look at this punitive damages issue in light of what U.S. District and Circuit Courts have done with foreign arbitration clauses because access to Courts for seafarers has been severely limited. Taking away punitive damages, in connection with these arbitration provisions, as well as sham

unions and flags of convenience creates a dangerous and unfair situation for the seafarer. The closing of the doors to the admiralty Courts is wholly contrary to the long-standing precedent that Seafarers are wards of the admiralty Courts.

### A. SEAMAN ARE EMPHATICALLY THE WARDS OF THE ADMIRALTY COURTS AND TREATED AS A FAVORED CLASS BY CONGRESS.

"**Seafarer from the start were wards of admiralty.**" *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971) *citing Robertson v. Baldwin*, 165 U.S. 275, 287 (1897). In 1823, Justice Story declared:

> Every Court should watch with jealousy an encroachment upon the rights of a seaman, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But Courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty . . . *Harden v. Gordon*, 11 F. Cas. 480 (No. 6047) (C.C. Me. 1823).

As this Court later stated "[f]rom the earliest times maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seafarer." *See Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724 (1943). The

*Aguilar* Court further held: "the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seaman of the comforts and opportunities for leisure, essential for living and working that accompany most land occupations." *Id.*, at 728.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995) (internal citations omitted), this Court reaffirmed this longstanding principle that seafarers are wards of the Admiralty Courts as a "feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected." The Fifth Circuit Court of Appeals explained the rationale for affording seafarers special protections in *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240, 243 (5th Cir. 1991):

> [Seafarers] enjoy this status because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seafarers. Shipowners generally control the availability and terms of employment.

Accordingly, the Admiralty Courts have a rich tradition of protection of seafarers, which flowed from the uniquely abhorrent conditions workers face at sea.

It is not just the Courts which recognize the need to protect seafarers, as "[t]he policy of Congress, as evidenced by its legislation, has been to deal with [seafarers] as a favored class." *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278 (1932). A recent example of Congress's intent to protect seafarers is shown through the 2008 amendment of the Jones Act venue provision.[5] Congress made its reasons for deleting the Jones Act venue provision clear: "[t]his subsection is being repealed to make clearer that the prior law regarding venue, including the holding in *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966) and cases following it, remains in effect, so that the action may be brought ***wherever*** the seaman's employer is doing business."[6] This amendment evidences Congress's intent to open the doors of the Admiralty Courts to seafarers, and in fact expand seafarers' access to Courts.

The Courts, like Congress, should continue to preserve seafarers' rights by ensuring their ability to access U.S. Courts and obtain a remedy for all their legal rights including punitive damages. Otherwise, as made clear by the following paragraphs, unscrupulous shipowners will not rest until they eviscerate seafarer's ancient rights in their rush to save money and increase profits.

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[5] *See* 46 U.S.C. § 30104.

[6] *See* 110th Congress, Report 110-437. (Emphasis added).

## B. LONG HOURS, LOW PAY, INSECURITY, FEAR AND EXPLOITATION . . . , NOTHING HAS CHANGED FOR SEAFARERS.

The working conditions for seafarers remain largely unchanged since Justice Story's time. For thousands of today's international seafarers life at sea is modern slavery and their work place is a slave ship.[7] Poor or unsafe living conditions, unpaid wages, long hours of work without breaks, abusive employers, abandonment of entire crews, little or no job security, the suppression of legitimate union activity and blacklisting seafarers that participate in union activities are all frequent occurrences on ships.[8] Most seafarers work seven days a week with long hours each day for months on end.

Far away from home in distant seas and out of the sight of regulators, shipowners can – and in many instances do – get away with abusing seafarer's rights without detection. Poor safety practices and unsafe ships make seafaring one of the most dangerous of all occupations and it is estimated there are over 2,000 deaths a year at sea.[9] In a 2002 study,

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[7] International Commission on Shipping, *Ships, Slaves and Competition*, NeatCorp Group (2000).

[8] Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, Windsor Review of Legal and Social Issues. 19 W.R.L.S.I. 85 (2005).

[9] Source: International Transport Workers Federation ("ITF"). The ITF has been helping seafarers since 1895 and today represents the interests of seafarers worldwide, of whom over 600,000 are members of ITF affiliated unions.

researchers at Oxford University found that seafarers are up to 50 times more likely to die while working compared to those in other jobs.[10]

Life at sea for many seafarers involves much abuse. Physical abuses include beatings and sexual assault, inadequate medical treatment, sub-standard accommodation, and inadequate food. Mental abuse arises from isolation, cultural insensitivity and a lack of amenities for social interaction.[11] Non-payment of wages, delays in paying entitlements to families, and even abandonment are additional abuses that contribute to the suffering of a large proportion of seafarers. There are few major ports in the world that have not played host to one or more abandoned ships and their crews in recent years. The crews can go for many months, sometimes years, with no pay and little hope of repatriation. Unless these seafarers receive the assistance of unions or special services of seafarers' missions, they will usually lack the means or ability to seek redress through the flag States' Courts or administrative systems, and are, therefore, wholly reliant on charity for their subsistence.[12]

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[10] Dr. Stephen Roberts, Oxford University. *The Lancet*, Volume 360, Issue 9332, Pages 543-544, August 17, 2002.

[11] International Commission on Shipping, *Ships, Slaves and Competition*, NeatCorp Group (2000).

[12] *Id.*

Here are just a few of examples of the harsh reality of life and work at sea:[13]

- The condition of the first mate on one vessel was comparable to someone with a blood alcohol level of 0.05% because he was so sleep deprived and overworked.

- A scuffle aboard a vessel ended with a casualty after several members of the crew were beaten and thrown overboard.

- On a ship registered in Colombia, death threats were made to crew members when they expressed concern over their safety on a ship that was far below par.

- An entire crew of 27 seafarers were killed in 2001 after the poorly maintained *Christopher,* an 18 year old vessel registered in Cyprus and owned by a Greek company, sank en route to the United Kingdom.

- Between 1996 and 2000, 3,500 seafarers on 210 ships contacted the International Transport Workers Federation ("ITF").

- In the year 2002, the ITF recovered 32.4 million dollars in unpaid wages for seafarers working on Flag of Convenience vessels.

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[13] Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, Windsor Review of Legal and Social Issues. 19 W.R.L.S.I. 85 (2005).

• When a seafarer and his twelve colleagues decided to strike over the $147,000 owed to the crew in back wages, those involved in the strike were replaced and their leader was blacklisted.[14]

The need for the Admiralty Courts ward ship over seafarers has never been greater. Despite this overwhelming need, the lower Admiralty Courts have begun closing their doors to seafarers, leaving them at the mercy of unscrupulous shipowners, who place corporate profit above the law.

### C. FOREIGN ARBITRATION CLAUSES PLACED IN SEAFARER'S CONTRACTS IMPROPERLY TAKE AWAY ACCESS TO AMERICAN COURTS AND LEAVE SEAFARERS WITH AN ILLUSORY REMEDY.

Courts are denying access to U.S. Courts for seafarers at an alarming frequency and under draconian circumstances. Foreign arbitration provisions contained in seafarer's contracts which require the seafarer to arbitrate in remote international locations are being uniformly enforced despite the undeniable fact that destitute, injured seafarers cannot afford to arbitrate these claims. These lower courts follow federal policy in favor of arbitration[15], and

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[14] Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, Windsor Review of Legal and Social Issues. 19 W.R.L.S.I. 85 (2005).

[15] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

erroneously disregard the precedent that seafarers are the wards of the Court and Justice Story's charge that their contracts should be watched closely for overreaching.[16]

Further, these foreign arbitration provisions are being enforced by District Courts despite valid, recognized defenses to enforcement. The Convention on the Recognition And Enforcement of Foreign Arbitral Awards expressly states that these contracts should be enforced "**unless [the Court] finds that the said agreement is null and void, inoperative or *incapable of being performed*.**"[17] In nearly every single case where a seafarer is compelled to arbitrate in some far flung foreign jurisdiction, the

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[16] In *Harden v. Gordon*, 11 F. Cas. 480 (No. 6047) (C.C. Me. 1823) Justice Story stated: "[Seamen] are emphatically wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, . . . wards with their guardians, and . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that *pro tanto* the bargain ought to be set aside as inequitable. . . . And on every occasion the court expects to be satisfied that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen."

[17] *See* Article II, § 3 1958 Convention on the Recognition And Enforcement of Foreign Arbitral Awards (New York Convention) (Emphasis added).

arbitration is incapable of being performed because the injured, destitute seafarer cannot afford the prohibitive associated costs of arbitration (round-trip airfare to a destination thousands of miles away from their home country; lodging; food; legal representation; translation of documents; and/or other associated costs). This high hurdle makes foreign arbitration incapable of being performed.[18]

To make matters worse, after a District Court compels foreign arbitration, the seaman is often unable to obtain appellate review. The Circuit Courts of Appeal often find that an order compelling arbitration is an interlocutory order not immediately appealable.[19] Thus, seafarers are not only left with an illusory remedy they cannot afford, but they are precluded from appellate review of the order. Therefore, the seafarers are ultimately left without redress for their injuries.

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[18] This Court recognizes a "prohibitive cost" defense to a demand to enforce arbitration of federal statutory claims. *See Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90, 148 L. Ed. 2d 373, 121 S. Ct. 513 (2000). When federal rights are at issue (as they are herein), the Court recognized that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree*, 531 U.S. at 90. This is exactly what is occurring because when district courts compel these foreign arbitrations, the seamen are stuck with an illusory remedy.

[19] *See Reshma Harilal v. Carnival Corp.*, Appeal Number 08-14524-HH; *Mohan Rao Koda v. Carnival Corp.*, Appeal Number 07-14718.

Enforcement of these foreign arbitration clauses has made the conduct of unscrupulous shipowners even more brazen and taken to dangerous extremes where they can now commit crimes with impunity. Shipowners now have confidence they will not be held accountable in U.S. Courts and are not likely to be held accountable in the foreign arbitrations. This "confidence" has quickly escalated to levels which constitute forced labor, slavery and/or human trafficking of the seafarer.

An example of the danger of these arbitration provisions is *Reshma Harilal v. Carnival Corp.*, District Court Number: 08-20355 CV-WMH. Seafarer Reshma Harilal filed suit against her employer Carnival Corporation in the United States District Court for the Southern District of Florida, for modern day slavery and/or forced labor in violation of multiple federal statutes. Harilal was lured from her home in South Africa with the promise of a job as stateroom stewardess. When she arrived in Florida she was forced[20] to sign a seafarer's contract indicating her position was such. Soon thereafter, Carnival informed her she would in fact be working as an *assistant* stateroom stewardess making **one fifth** what she

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[20] There was record evidence Harilal was not provided the time or opportunity to read the contract and signed it under duress. Plaintiff was never made aware that this contract included an arbitration provision because she was not allowed to read the page on which the arbitration provision was contained.

would make as stateroom stewardess.[21] Harilal refused to work in this lower position and requested Carnival to return her passport so she could leave the ship and return home. Carnival refused to return Harilal's passport in direct violation of 18 U.S.C. § 1592, refused to let her leave the ship, and forced and/or psychologically coerced her to stay onboard and work. This occurred while the ship was still in a Florida port with plenty of time for Harilal to leave the ship.

The seafarer's agreement Harilal was forced to sign contained a foreign arbitration provision. This arbitration clause required Harilal to arbitrate in Monaco, which is **5,295** miles away from her home in Durban, South Africa. Harilal set forth extensive evidence of the prohibitive costs of arbitrating in Monaco.[22]

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[21] Harilal was just one of fifteen or sixteen crew members onboard this single ship that the identical "bait and switch" tactic was used.

[22] Harilal presented record evidence of the following estimated costs: A round trip flight from South Africa to Monaco cost approximately $6,430.00. The total estimated expense for lodging would be approximately $5,000.00 for ten nights. The total estimated expense for food would be approximately $1,000.00 for ten days. Plaintiff's total estimated expenses would be approximately $12,430.00 for airfare, food and lodging necessary for her to arbitrate in Monaco. In addition, Plaintiff would need to pay for legal representation estimated to cost 17,000 euro.

Notwithstanding these egregious facts, Harilal was ordered to arbitrate. Harilal timely appealed the order compelling arbitration but the Eleventh Circuit Court of Appeals *sua sponte* dismissed the appeal for lack of jurisdiction.[23] Therefore, this modern day slave, who was forced to sign a contract which she did not know contained an arbitration clause was compelled to a foreign arbitration which is incapable of being performed.[24] This was done even though multiple statutes on human trafficking/slavery were alleged to have been violated.

Reshma Harilal's story makes clear that seafarers who endure the most difficult of conditions are being wrongly deprived of access to U.S. Courts and are no longer being recognized as wards of the admiralty Courts. "In other words, American maritime employers are free to hire third world labor to work in deplorable conditions but, because arbitral clauses permit removal, they can in effect, immunize themselves from the unique safeguards American general maritime law provides to ameliorate the harshness of the realities of maritime employment."[25] These

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[23] *Reshma Harilal v. Carnival Corp.*, Appeal Number 08-14524-HH.

[24] After being compelled to arbitration, Harilal filed the arbitration in Miami, Florida and sought to have the arbitration take place in Miami, but such relief was denied.

[25] Rory Bahadur, *Constitutional History, Federal Arbitration And Seamen's Rights Sinking In A Sea Of Sweatshop Labor.* Journal of Maritime Law and Commerce, April 2008.

arbitration provisions and their interpretation have abruptly closed the door to the District and Appellate Courts. Taking away the risk of a punitive damage award coupled with arbitration provisions will only make the shipowners bolder in their violation of the rights of seafarers. These punitive damages only arise in a situation where a seafarer is sick or injured and therefore at their lowest point, economically speaking. This is a blueprint to allow shipowners to run rampant, deny medical care to their seafarers and shift the costs to charities or governments. Why should the United States government or state governments or charities pay the costs of food, shelter, transportation, and medical care that are the obligations of these shipowners?

### D. SHAM UNIONS: COLLUDING WITH SHIPOWNERS TO BARGAIN AWAY SEAFARER'S RIGHTS TO MAINTENANCE AND CURE

In the unregulated world of flag of convenience shipping and cruise lines, one of the few remaining American laws that apply to *all* shipowners using U.S. ports is the right to maintenance and cure. As illustrated by Petitioner, under the General Maritime Law of the United States, when a seaman, while in the service of a ship, becomes sick and/or injured; the shipowner is required to provide food, lodging, transportation, and medical treatment.

To circumvent this ancient right, shipowners have teamed up with *sham* unions claiming to represent and protect seafarers. The practice is common in the cruise line industry. Take for example the case of Christine Gheorghita,[26] a cabin stewardess who became sick while working aboard the ship *Enchantment of the Seas*. Her sick pay ($12.50 per day) was set under a Collective Bargaining Agreement ("CBA") between the shipowner and the Norwegian Seafarer's Union ("NSU"). Pursuant to the agreement, the company was able to stop her sick pay after the end of a seven day voyage rather than at the end of her six month contract – as is provided under the General Maritime Law. Thus, in essence, the union bargained away the benefits Ms. Gheorghita and all the other similarly situated cabin stewardesses were entitled to under law.

Although the NSU referred to itself as a labor *union*, its conduct and day-to-day operations did not fit the definition of a traditional labor organization. Ms. Gheorghita did not know she was working under a Collective Bargaining Agreement.[27] She never voted for or against the terms of the agreement; never voted

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[26] *Gheorghita v. Royal Caribbean Cruises, Ltd.*, 93 F. Supp. 1237 (S.D. Fla. 2000).

[27] Remarkably, this lack of knowledge is not limited to lower level workers aboard ships, as Captain Steinmoen, captain of Royal Caribbean vessels also did not know that he was a member of the NSU. *See Svein Steinmoen v. Royal Caribbean Cruises Ltd.*, District Court Number: 1-07-CIV-21235 GRAHAM.

in any union election; never heard about or attended a union meeting; and never paid any union fees.[28] It is typical that most cruise line workers are wholly ignorant about these foreign unions.[29]

As reported by the New York Times,[30] by forming "offshore" affiliates with radically lower wages and conditions than the home union, the NSU and other unions, have perverted the foundations of trade unionism by colluding with the shipowner. As evidenced by their agreements, accepting benefits lower than those required by law, and shunning even the most basic of democratic processes, these sham unions have established that their allegiances lie with the shipowner rather than the seafarers they purportedly represent.[31]

## E. FLAGS OF CONVENIENCE: ESCAPING THE ARMS OF U.S. REGULATORS.

Shipowners, both cruise lines and shipping companies, fly "flags of convenience" aboard their

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[28] *Gheorghita*, 93 F. Supp. 1237 (S.D. Fla. 2000).

[29] This is particularly true, since in *Gheorghita*, the Company paid directly to the Union close to $300,000 per year. Other shipowners, such as Celebrity Cruises, follow this practice.

[30] Douglas Frantz, *Sovereign Islands/A Special Report: For Cruise Ship's Workers, Much Toil, Little Protection.* New York Times, December 24, 1999.

[31] Sailors Union of the Pacific, *Floating Sweatshops, Foreign-flag cruise ship working conditions exposed.* Volume LXIII, No. 1, January 21, 2000.

ships. In doing so, shipowners are placed under the jurisdiction of the flag state. Cheap registration fees, low or no taxes and freedom to employ cheap labor are some of the motivating factors behind a shipowner's decision to fly a flag of convenience. Most flag of convenience states such as Panama, Liberia and the Bahamas are renowned for lax enforcement of permissive laws. Remarkably, even though ninety (90) percent of the nearly six million cruise line passengers that sailed out of United States ports in 1999 were American, *and* most cruise lines have their headquarters in the United States, these companies escape American minimum wage requirements and other labor laws the same way they avoid corporate income taxes and criminal and environmental laws.[32]

### F. REMOVAL OF THE THREAT OF PUNITIVE DAMAGES FOR THE WILLFUL FAILURE TO PAY MAINTENANCE AND CURE WILL BE THE PROVERBIAL NAIL IN THE COFFIN OF SEAFARERS' RIGHTS.

Without the threat of punitive damages for the willful failure to pay maintenance and cure, seafarers will be left with an empty quiver. Punitive damages are one of the few weapons available to get shipowners to do what they are supposed to do and

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[32] Douglas Frantz, *Sovereign Islands/A Special Report: For Cruise Ship's Workers, Much Toil, Little Protection.* New York Times, December 24, 1999.

without such a threat, things will get worse for seafarers. Penalties are important for those shipowners who repeatedly withhold maintenance and cure from injured crew members because some employers willfully withhold these payments as a method to force settlements at an early stage.[33] Seafarers have scant resources to sustain themselves adequately after an injury or sickness, or to pay for proper medical attention and therapy. Unless the Courts place a significant penalty on the willfully improper actions of these employers, the crew members will continue to be victimized.

The right of maintenance and cure created a serious responsibility, and the potential legal penalties in the event of a violation required masters, employers, and vessel owners to protect the health and safety of seafarers in their service. Further, the right provided inducement for seafarers to undertake perilous journeys and endure the hardships of life at sea.[34] Make no mistake; removal of these penalties will be taken full advantage of by unscrupulous shipowners. Unfortunately, even scrupulous shipowners will be forced to take advantage of the absence of punitive damages in order to stay competitive

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[33] Paul S. Edelman, *Guevara v. Maritime Sea Corp.: Opposing the Decision*, Tulane Maritime Law Journal, 20 TLNMLJ 349 (1996).

[34] Eugene Brodsky, *From Subsistence to Starvation: A Call For Judicial Reexamination of Gardiner v. Sea Land Service, Inc.*, 9 U.S.F. Mar. L.J. 71 (1996).

against the unscrupulous ones. Accordingly, the removal of punitive damages for the willful failure to pay maintenance and cure will place a nail in the coffin of seafarers' rights.

### G. WITHOUT PUNITIVE DAMAGES, SEAFARER'S CLAIMS BASED ONLY ON A SHIPOWNER'S FAILURE TO PAY MAINTENANCE AND CURE WILL FIND IT VERY DIFFICULT TO OBTAIN REPRESENTATION, FURTHER FORECLOSING THEIR ACCESS TO COURTS.

For a profession that requires people to work for long periods of time without proper rest, seafarers make meager wages. With limited financial means they attempt to feed themselves and their families. It is not surprising, therefore, that a seaman is unable to afford legal representation in the United States, where an attorney's billable *hours* might be as much as a month's wages for a seafarer.

As a result of the availability of different payment arrangements – most prevalent among them the Contingency Fee – seafarers have gained access to counsel where they would have otherwise not been able to. The typical arrangement requires the attorney to make a substantial time and financial investment in the seafarer's case. The attorney is willing to take this risk because if the client recovers damages from a settlement or favorable verdict, the attorney gets a fee from the recovery and their litigation

expenses reimbursed. It is key therefore that the potential attorney's fee from the recovery is enough to a) recover the initial investment and b) reasonably compensate the attorney for his or her services. Attorneys, like all business owners, must make wise business decisions to cover their expenses and keep their doors open.

A seaman that becomes sick or injured while in the service of a vessel, regardless of fault of the shipowner or operator, is entitled to maintenance and cure as a matter of right.[35] A seaman's maintenance and cure claim, by itself, generally has a relatively small value as compared to a seaman's claims of Jones Act Negligence or Unseaworthiness. The maintenance and cure claim consists merely of the cost of food, lodging, transportation, and/or medical care the shipowner failed to provide to the seaman. Whereas, the Jones Act Negligence and Unseaworthiness claims consist of the larger value claims including pain and suffering, future medical expenses, and lost wages/diminished earning capacity, etc. If a seafarer has a Jones Act Negligence and/or an Unseaworthiness claim along with a maintenance and cure claim, they are more likely to be able to obtain contingency fee representation due to the larger potential value of their overall case which justifies an attorney to invest the time and money in the case. If a seafarer only has a maintenance and cure claim, it will be very difficult

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[35] *See Couts v. Erikson*, 141 F. 2d 499 (5th Cir. 1957).

(if not impossible) for him or her to obtain adequate legal representation due to the smaller value of the claim if the availability of punitive damages are taken away.

The Petitioner argues punitive damages are unnecessary to properly motivate shipowners to provide maintenance and cure benefits because compensatory damages and attorney's fees can be awarded in certain circumstances to protect the seafarer.[36] Unfortunately, Court awarded attorney fees alone are not sufficient incentive to take these case because the awards are usually low. If there is no finding of willfulness, then the attorney essentially works for free, and even if the attorney does prove willfulness, then they receive a minimal fee. This is the reality of the real world with respect to seafarers' attorneys. That is not to say that many seafarers' attorneys will not take a maintenance and cure case based on compassion rather than economics. However compassion does not pay the bills and these attorneys are limited in the number of money losing cases they can handle. Thus, Petitioner's argument is without merit.

Furthermore, compensatory damages and attorney's fees do nothing to protect the seafarer if he/she cannot obtain legal representation to even get in the Courthouse door. Take as an example, a seaman's claim for $1,500 for necessary medical care

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[36] Petitioner's Brief, Page 30.

recommended by a doctor, but refused by the shipowner. Most attorneys would not be able to accept a $1,500 maintenance and cure claim on a contingency fee basis, regardless of the seaman's entitlement. Practically, the amount of time and expense of pursuing this seaman's claim prohibits an attorney from accepting the case on a contingency fee. The injured/ill seaman, who earns less than $1,500 a month and is unable to return to work until the necessary medical care is provided, cannot afford to pay for the recommended medical care himself. The seaman cannot afford to hire an attorney on an hourly basis to enforce his legal right to that benefit. To make matters worse, the injured/ill seaman cannot work to earn the money to pay for the medical care or the legal representation because he needs the medical care that was refused by the shipowner to be fit for duty. This seafarer is left without options. Quite clearly, in this scenario, the shipowner wins. The shipowner did not have to pay the $1,500 for the seaman's medical care, compensatory damages or attorney's fees because the seaman was unable to pursue his claim. Therefore, without the possibility of punitive damages, the shipowner can and will get away with willfully refusing seafarers' maintenance and cure benefits.

If, however, a seafarer is able to claim punitive damages for the willful failure of the shipowner to pay maintenance and cure, the seafarer dramatically increases the likelihood of an attorney taking on their case. Therefore, maintaining the availability of

punitive damages provides access to the Courts for seafarers who cannot afford to pay the attorney's fees and costs for actions consisting solely of maintenance and cure claims. Whereas the removal of punitive damages for the failure to pay maintenance and cure is not only closing the Courthouse doors, it is also closing the seafarer's access to legal representation as well. When the shipowner does a financial analysis of not paying maintenance and cure claims, the availability of punitive damages makes it impossible for the shipowner to safely figure out that not paying maintenance and cure is more profitable. The element of punitive damages adds an unknown variable to the equation that a corporate bean counter cannot rely on. Therefore, the possibility of punitive damages greatly increases the chance that the shipowner is more likely to do the right thing and follow the law.

## II. RESPONSE TO *AMICUS* CLIA'S ARGUMENTS

*Amicus* CLIA argues there will be a flood of unnecessary litigation if punitive damages are allowed.[37] There is no danger of "a flood of unnecessary litigation" occurring unless the shipowners willfully refuse valid claims. Maintenance and cure claims are self-effectuating. If the cruise line provides the seafarer with the maintenance and cure benefits that

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[37] Brief of *Amicus Curiae* Cruise Lines International Association In Support of Petitioners, Page 5.

they are entitled to by law, then there would not be any claims. A claim can only arise if the shipowner willfully denies a seafarer necessary medical care and/or food and lodging while on shore recovering from the injury or illness. Thus, it is the shipowner who controls the floodgates to the amount and frequency of these claims.

*Amicus* CLIA also argues that more seafarers will seek recoveries in the U.S. if punitive damages are allowed, thereby causing the U.S. to become the Courthouse to the world.[38] This argument is meritless because Congress already decided that a foreign seafarer can bring their claims wherever the seafarer's employer is doing business.[39] Therefore, shipowners doing business in the U.S. will be subject to claims in the U.S. as mandated by Congress regardless of the outcome of this case.

In addition, *Amicus* CLIA argues shipowners will be exposed to punitive damages for mistakes in choosing the right maintenance and cure scheme; applying the domestic scheme improperly; and/or asserting a defense.[40] As stated by CLIA, the cruise industry employs over 140,000 crew members from all over the world.[41] The cruise industry, as the

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[38] Brief of *Amicus Curiae* Cruise Lines International Association In Support of Petitioners, Page 9.

[39] 46 U.S.C. 30104 (2008).

[40] *Id.*, at 4, 9.

[41] *Id.*, at 5.

employer of that many foreign seafarers, should certainly know what maintenance and cure scheme to apply and how to apply it to each seafarer they hire. They should not hire foreign seafarers if they are unable to determine how to provide them with the ancient, basic obligations of maintenance and cure.

Furthermore, CLIA's members would not be subject to punitive damages under any "mistake" scenarios unless there was a finding of willfulness because punitive damages are not awarded for a mere mistake. If the shipowner had a reasonable basis for choosing the scheme, the application of the domestic scheme, and/or asserting a defense, then there would be no finding of the requisite willfulness needed to award a punitive damage award.

Also, *Amicus* CLIA argues that because the cruise industry substantially benefits the U.S. economy they should not be responsible for punitive damages if they willfully refuse maintenance and cure benefits.[42] This argument is best described as disingenuous. The cruise industry does not support the U.S. economy and is, in reality, a burden on the U.S. The cruise industry, as well as most shipowners, flag their ships in foreign countries despite many of them being based in the U.S. and/or doing substantial business in the U.S. The flag of convenience allows the shipowners to avoid paying U.S. taxes and to avoid U.S. laws and responsibilities. The shipowners

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[42] *Id.*

employ mostly foreign citizens to work aboard their vessels for a substantial labor cost savings and avoidance of compliance with U.S. labor laws. This practice wholly precludes the hiring of ready, willing, and able U.S. workers that are desperately seeking jobs in this dire economy. Furthermore, the cruise industry has demonstrated its callous disregard of American law, as Carnival, Royal Caribbean, Regency Cruises, Ulysses Cruises of Miami and Seaway Maritime of Greece, Holland America, Princess Cruises, Palm Beach Cruises, American Global Lines, and Norwegian Cruise Lines are all convicted corporate felons.[43]

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[43] *Cruise Line Dumping Convictions Add Up*, USA Today, November 7, 2002. For instance, in 1999 Royal Caribbean Cruises Ltd., one of the world's largest passenger cruise lines, agreed to pay a record $18 million criminal fine and agreed to a 21 federal felony count plea agreement for dumping waste oil and hazardous chemicals and lying to the U.S. Coast Guard. In a plea agreement, filed in U.S. District Court in six cities, Royal Caribbean admitted that it routinely dumped waste oil from its fleet of cruise ships, such as the environmentally sensitive Inside Passage of Alaska. It also pleaded guilty to the unprecedented charge that it deliberately dumped into U.S. harbors and coastal areas many other types of pollutants, including hazardous chemicals from photo processing equipment, dry cleaning shops and printing presses. Similarly, in 2008, Norwegian Cruise Line entered a guilty plea in U.S. District Court in Miami in connection with the May 25, 2003 boiler explosion aboard the S.S. NORWAY in the Port of Miami. NCLL pled guilty to a single charge brought under federal shipping laws alleging grossly negligent operation of the *S.S. NORWAY*, which placed the lives and property of persons on board the vessel at risk and led to the death of at least one individual, in violation of Title 46, United States Code, Section 2302(b).

Accordingly, these shipowners provide little benefit to the American economy.

These shipowners are now seeking to limit their responsibility under U.S. law with regard to seafarers. The significance of this case extends beyond seafarers' rights; it also has major social and ecological implications.[44]

## III. CONCLUSION

PMI respectfully requests this Honorable Court continue the tradition of protection of seafarers by ensuring their ability to access U.S. Courts and maintaining the availability of punitive damages for

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[44] Thousands of vessels come to America's shores each year. While cruise lines have hundreds of crew on each vessel, most large cargo ships are manned with somewhere from ten to twenty crew members. The negative impact of these vessels upon American ports, beaches, estuaries, aquifers, and reefs is enormous. This Court must recognize that the immeasurable damage caused by catastrophic maritime accidents (*see* Exxon Valdez, SS Norway) is inextricably related to the manner in which the vessel is operated, maintained and staffed. Without a strong impetus to maintain a seaworthy vessel, properly manned and equipped, and compelled to care for its crew, shipowners will succumb to the desire for corporate profits and expediency. The shipowner will allow the crew to work sick and injured, making the vessel (whether a container ship, a liquefied natural gas carrier, an oil tanker or a cruise liner) a danger to all around it. Shipowners have consistently proven they are willing to transfer the cost of their short term gain to those unfortunate enough to be present when disaster strikes, be it seafarer, port, beach, reef or American taxpayer.

the willful failure to provide maintenance and cure benefits to seafarers. There is no valid reason to abandon seafarers at this point in our history and to ignore hundreds of years of tradition that has led our courts to proclaim that seafarers are the wards of admiralty.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 08-214

# In The Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

*Petitioners,*

v.

EDGAR L. TOWNSEND,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* SAILORS' UNION OF THE PACIFIC IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICUS CURIAE*[1]

This brief is filed in support of Respondent by the Sailors' Union of the Pacific ("SUP"). The SUP was formed in 1891 by Andrew Furuseth – the "Emancipator of Seamen"[2] – from an amalgamation of the Coast Seamen's Union (organized in 1885) and the Steamship Sailors' Union (established in 1886). It represents unlicensed sailors serving in the deck, engine, and steward's departments of U.S.-flag merchant vessels trading all over the world. It is headquartered in San Francisco, maintains branches in Wilmington, California, Seattle, Washington, Honolulu, Hawaii and Norfolk, Virginia, and has been championing the rights and interests of seamen for over 120 years. The SUP's interest in this case lies in clarifying and confirming the long-standing principle that punitive damages may be levied against shipowners who flout their obligation to provide ill and

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of Court. Pursuant to Rule 37.6, *Amicus* confirms that no counsel for a party authored any part of this brief, no party or counsel for a party made a contribution intended to fund the preparation or submission of this brief, and no person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation.

[2] It was Furuseth who famously remarked: "You can put me in jail, but you cannot give me narrower quarters than as a seaman I have always had. You cannot make me lonelier than I have always been."

injured seamen with maintenance (living expenses) and cure (medical care).

## SUMMARY OF ARGUMENT

Last term, in *Exxon Shipping Co. v. Baker*, this Court confirmed that maritime law provides a judge-made remedy for punitive damages whenever "a defendant's conduct is 'outrageous,' owing to 'gross negligence,' 'willful, wanton and reckless indifference for the rights of others,' or behavior even more deplorable." The Brief of *Amicus Curiae* American Association for Justice ("AAJ") demonstrates that seamen are particularly entitled to assert that remedy. The SUP submits that this entitlement may be at its very strongest in the maintenance and cure context.

Maintenance and cure invest seamen – the traditional favorites of admiralty – with some of the oldest, strictest, and most pervasive rights in all of American law. These rights were fashioned to protect ill and injured seamen and to forestall wasteful litigation. The threat of punitive damages reinforces these goals by deterring serious wrongdoing on the part of unscrupulous shipowners and attracting skilled attorneys to the side of needy seamen. The seaman's right to seek punitive damages against shipowners who flout their obligation to pay maintenance and cure was thus well settled by the time the Jones Act was passed. The Act did not repeal that

well-settled right. It was adopted to expand and enhance the legal protections due seamen not narrow them.

If a majority of this Court did not expressly levy punitive damages against the unscrupulous shipowner in *Vaughan v. Atkinson*, it was only because the mistreated seaman did not request them. The doctrinal justification for the exception *Vaughan* carved out of the "American Rule" – when it made callous shipowners liable for a disabled seaman's attorney's fees – is difficult to understand unless the intent was to *punish* the "wanton and intentional disregard" of the right to maintenance and cure.

Petitioners' contention that *Miles v. Apex Marine Corp.*, denudes seamen of the right to seek punitive damages stretches and distorts that narrow decision in three unsupportable ways – from the context of wrongful death to the claims of living seamen, from the realm of tort to the altogether different territory of maintenance and cure, and from the salve of compensatory damages to the scourge of exemplary awards. Properly interpreted, *Miles* neither decides, says, nor implies *anything* about punitive damages. As this Court explained in *Exxon Shipping v Baker* – when it dismissed a *Miles*-based argument virtually identical to the one petitioners urge here – to hold otherwise would frustrate the objectives of maritime law by "fragmenting" the established recovery scheme and severing remedies from their causes of action.

Petitioners' fall-back claim that punitive damages cannot lie in a maintenance and cure action because they are not ordinarily available "in contract" is equally wrong. The obligation to pay maintenance and cure is *sui generis*, was created long before the courts started distinguishing between tort and contract, and is implied in law as an inherent "incident" of the shipowner-seaman relationship without regard to the promises of either party.

The arguments of *Amicus Curiae* Cruise Line International Association ("Cruise Lines") are likewise unconvincing. The suggestions that punitive damages are somehow undesirable or unnecessary are not only naive and self-serving but utterly unsubstantiated. The request that this Court re-write federal maritime law to prevent "transoceanic forum shopping" elevates forum over substance, ignores the choice-of-law and *forum nonconveniens* doctrines that already stand guard at the gate, and forgets that Congress ratified the International Shipowners' Liability Convention to raise world maintenance and cure standards to the American level. The attempt to veil the punitive holding in *Vaughan v. Atkinson* with a semantic quibble about degrees of reprehensibility was betrayed by the *Baker* Court's confirmation that maritime punitive damages can attach to a wide spectrum of deplorable behavior ranging from overt malice to gross negligence. And the Cruise Lines' remaining cavils – such as the overwrought contention that the "very assertion of a defense will provide the 'willfulness' upon which a crewmember will seek

to base a punitive damage award" – are absurd and barely merit a reply.

Whatever petitioners or the Cruise Lines might contend, seaman have always had the right to sue their employers for punitive damages – especially when those employers flout the ancient obligation to pay maintenance and cure.

## ARGUMENT

### I. Seamen Are Entitled to Seek Punitive Damages Against Employers Who Wantonly Disregard the Maintenance and Cure Obligation

#### A. Maintenance and Cure Law Aims at Protecting Seamen While Avoiding Litigation

The responsibility to provide sick and injured seamen with maintenance and cure is an "ancient duty" that "has been imposed upon the shipowners by all maritime nations." *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 665, 667 (1943). Sometimes described as "unbeatable,"[3] a seaman's rights to maintenance and cure are "among the most pervasive" in American law.[4] This Court has often emphasized that

[3] *Bay Dredging & Contracting Co. v. Porter*, 153 F.2d 827, 833 (1st Cir. 1946).

[4] See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943); see also, *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S.

(Continued on following page)

"the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficent purposes."[5]

The remedy is designed to ensure that sick and injured seamen get prompt and unstinting benefits for humanitarian reasons and to secure their rehabilitation and return to service.[6] The "litigiousness which has made the landman's remedy so often a promise to the ear to be broken to the hope" is anathema. *Farrell v. United States*, 336 U.S. 511, 516 (1949):

> It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and mastered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations.

*Id.* "The employer has a duty to promptly investigate any claim and should resolve doubts in favor of paying the seaman his due."[7]

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36, 41-42 (1943); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938).

[5] *Aguilar*, 318 U.S. at 735; see also *Warren v. United States*, 340 U.S. 523, 530 (1951).

[6] Justice Story elaborated these points in *Harden v. Gordon*, 11 F. Cas. 480, 482-483 (C.C.D.Me. 1823) (No. 6,047).

[7] Thomas J. Schoenbaum, *Admiralty and Maritime Law* 307 (4th Hornbook ed. 2004).

Litigation sometimes ensues nevertheless.[8] When shipowners fail to discharge their pervasive duty, seamen can sue for the value of unpaid maintenance and cure. *The Osceola*, 189 U.S. 158, 169-173 (1903). If the shipowner's failure was negligent, the seaman can also sue for any resulting injuries "such as the aggravation of the seaman's condition, determined by the usual principles applied in tort cases to measure compensatory damages."[9] See *The Iroquois*, 194 U.S. 240 (1904). And if the "shipowner, in failing to pay maintenance and cure, has not only been unreasonable but has been more egregiously at fault,"[10] there is a "line of authority for awarding punitive damages."[11] See subsections I.B and I.D *infra*.

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[8] AMERICAN MARITIME CASES (AMC) has reported about 1115 maintenance and cure cases since its inception in 1923. See the AMC five-year digests for 1923-27 through 2003-07, at *Articles and Wages* ## 143, 144, 161; *Illness* # 112; and *Personal Injury* ## 118, 138, 141.

[9] *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987), *abrogated on other grounds by Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (*en banc*).

[10] *Id.*

[11] David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 149 (1997) ("Robertson").

### B. Well Before the Jones Act Was Passed in 1920, the Availability of the Punitive Damages Remedy in Maintenance and Cure Cases Was Settled Law

Understanding the relevant jurisprudence requires remembering that "[t]he distinction between punitive and compensatory damages is a modern refinement." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927). "American courts [began] to speak of punitive damages as separate and distinct from compensatory damages [only as] the [19th] century progressed." *Baker*, 128 S.Ct. at 2621. Long before and contemporaneously with the enactment of the 1920 Jones Act, courts thus regarded the availability of damages that were both compensatory and punitive for egregious failures to pay maintenance and cure as an undebatable proposition.

Punitive damages were assessed against shipowners who flouted their maintenance and cure obligations in *The Rolph*, 293 F. 269, 272 (N.D.Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924); *Unica v. United States*, 287 F. 177, 180 (S.D.Ala. 1923); *The Margharita*, 140 F. 820, 828 (5th Cir. 1905); *The Troop*, 118 F. 769, 772 (D.Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904); *The City of Carlisle*, 39 F. 807, 817 (D.Ore. 1889); and *Tomlinson v. Hewett*, 24 F. Cas. 29, 32 (D.Cal. 1872) (No. 14,087). (These cases are discussed in Section I.B of the AAJ's *Amicus* Brief).[12]

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[12] See also Robertson, *supra* note 9, at 86-116.

Other courts indicated that punitive damages would lie for seriously blameworthy violations of the maintenance and cure obligation. In *The Scotland*, 42 F. 925, 927 (S.D.N.Y. 1890), Judge Addison Brown (who had a large reputation as an admiralty expert[13]) made a generous damages award for a ship's improper medical treatment of an injured seaman and said that he would have added "punitive damages" if he had not been persuaded of the captain's "inherent kindness." In *The Vigilant*, 30 F. 288, 288 (S.D.N.Y. 1887), after awarding compensatory damages because a ship had neglected a seaman's medical needs, Judge Brown observed that he would have been "bound to add considerably" more had he not been "entirely satisfied of the master's good faith in his conduct, as well as of his intent to treat the seaman kindly and justly." In *The Svealand*, 136 F. 109 (4th Cir. 1905), a shipowner eventually paid all of a disabled seaman's medical expenses but had neglected his medical needs aboard ship. Awarding another $500 for pain and suffering because of "the apparently aggravated character of the injury" the court stated that it would have entered an even higher award if the shipowner's medical outlays had not already been so "considerable." *Id.* at 113. See also *Nevitt v. Clarke*, 18 F. Cas. 29, 31 (S.D.N.Y. 1846) (No. 10,138) (dictum that "vindictive damages" would lie for "wanton and unjustifiable" violations of seamen's rights); *The Childe Harold*, 5 F. Cas. 619, 620 (S.D.N.Y. 1846) (No.

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[13] See *id.* at 109-110 & n.194.

2,676) (stating that "punitive and compensatory" damages would be appropriate if the ship had fed rotted food to the crew).

### C. The Jones Act Did Not Strip Seamen of Any Pre-existing Remedies

"Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Far from evincing an intent to preempt, supercede, or repeal the availability of punitive damages in maintenance and cure cases, the Jones Act was designed to expand and enhance seamen's common law rights.[14] (This point is

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[14] See *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936) (stating that the Jones Act was "remedial [legislation] for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its ***purpose was to enlarge that protection, not to narrow it.***") (emphasis supplied); *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001) (stating that "general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes."); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) ("Congress enacted the Jones Act in 1920 to remove the bar to suit for negligence articulated in *The Osceola*, thereby completing the trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the 'perils of the sea.'") (citing Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 328-329 (2d ed. 1975), and David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79 (1985)); *McDermott International, Inc.*

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fully developed in Section III.A.1 of the AAJ's *Amicus* Brief.)

### D. *Vaughan v. Atkinson* Supports the Availability of Punitive Damages in Maintenance and Cure Actions

When Clifford Vaughan fell ill with tuberculosis, his employer's refusal to provide maintenance was "callous, . . . recalcitran[t], . . . willful and persistent." *Vaughan v. Atkinson*, 369 U.S. 527, 530-531 (1962). Sick as he was, Vaughan had to find work ashore as a taxidriver. When he brought suit, the district court held that: 1) He could only claim unpaid maintenance – no compensatory damages and no attorneys' fees – and; 2) The employer was entitled to a credit for the taxicab earnings. *Id.* at 528. The Fourth Circuit affirmed. *Id.*

This Court reversed the Fourth Circuit, annulled the credit, and made the shipowner responsible for

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*v. Wilander*, 498 U.S. 337, 342 (1991) (quoting Gilmore & Black 328-329 for the proposition that "[t]he only purpose of the Jones Act was to remove the bar created by *The Osceola*, so that seamen would have the same rights to recover for negligence as other tort victims."). See also *American Export Lines, Inc. v. Alvez*, 416 U.S. 274, 282-283 (1980); *Cox v. Roth*, 348 U.S. 207, 209 (1955); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 240 n.2, 248 (1942); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939); *Beadle v. Spencer*, 298 U.S. 124, 130 (1936); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 375-376 (1932); *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932); *James v. Encarnacion*, 281 U.S. 635, 640 (1930).

the seaman's attorneys' fees. Justices Stewart and Harlan dissented – but *only* on the credit issue. They agreed with the majority's attorneys' fees decision arguing merely that it needed a firmer doctrinal justification:[15]

> [The majority cites] nothing to [justify] a departure from the well-established ["American Rule"] that counsel fees may not be recovered as compensatory damages. However, if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be ***entitled to exemplary damages in accord with traditional concepts of the law of damages***. While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made. See *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 [1851].[16]

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[15] The majority's explanation of the doctrinal basis for the fee award is analyzed in David W. Robertson, *Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty*, 27 J. MAR. L. & COM. 507, 552-553 (1996).

[16] The relevant passage in *Day* stated: "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . [T]he degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also,

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369 U.S. at 540 (emphasis supplied, paragraph break and some citations omitted).

The *Vaughan* majority did not respond to Justices Stewart's and Harlan's views on the fee-award, but its opinion bristles with indignation on behalf of the mistreated seaman.[17] It thus seems likely that the only reason the majority did not expressly award punitive damages was that Vaughan had not asked for them. Agreed Gilmore and Black:

> It will be noted that the [*Vaughan*] Justices were, in effect, unanimous on the damage recovery. The dissenting Justices felt that the exemplary or punitive damages, if plaintiff was found entitled to them, should be awarded as such; the majority Justices, perhaps because of their narrow interpretation of the grant of certiorari and in order to

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that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel-fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."

[17] The Court called the employer's conduct "callous," "recalcitran[t]," "willful and persistent," and said "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." 369 U.S. at 530-531. It disparaged the idea of allowing a credit for Vaughan's taxicab earnings, stating that this would create "a sorry day for seamen" and put "a dreadful weapon in the hands of unconscionable employers." *Id.* at 533.

> avoid further proceedings, awarded what were essentially punitive damages under the name of counsel fees.[18]

The First Circuit expressed the same view in *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051 (1st Cir. 1973), noting that Justices Stewart and Harlan, although dissenting on another point, were "seemingly in agreement with the majority's fundamental premise" that punitive damages were appropriate.[19] Many lower courts have cited *Vaughan* as authority for awarding punitive damages against callous and recalcitrant shipowners.[20]

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[18] Gilmore & Black, *supra* note 14, at 313 (footnotes omitted).

[19] Petitioners (at 11) proclaim that "*Robinson* never addresses why it finds so much comfort in the [*Vaughan*] dissent." This is dramatically wrong. Indeed, the major importance of *Robinson* is the court's careful attention to the indications that the *Vaughan* Justices were split on the credit issue but generally agreed on the damages point.

[20] See, e.g., *Hines v. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987); *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 88 (5th Cir. 1984); *Holmes v. J. Ray McDermott & Company*, 734 F.2d 1110, 1118 (5th Cir. 1984); *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981); *Trident Marine, Inc. v. M/V Atticos*, 1995 WL 91125 at * 1 (E.D.La., March 1, 1995); *Ridenour v. Holland America Line Westours, Inc.*, 806 F. Supp. 910, 912-913 (W.D.Wash. 1992); *Cheramie v. Garland*, 1989 WL 133098 at * 5 (E.D.La., October 20, 1989); *In re Den Norske Amerikalinje A/S*, 276 F. Supp. 163, 173-174 (N.D. Ohio 1967), *rev'd on other grounds sub nom. United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969); *Weason v. Harville*, 706 P.2d 306, 309-310 (Alaska 1985). Note that the foregoing cases from the Fifth and Ninth Circuits have been overruled or undermined by *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir.

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### E. The Two Fundamental Policies of Maintenance and Cure Law Require an Effective Penalty

In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36-37 (1990), this Court cited the "strong policy arguments" of Richard Posner for allowing compensation for a fatal accident victim's lost future income. Judge Posner has also presented strong policy arguments for punitive damages in virtually all cases of serious wrongdoing. William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 47-48, 160-163, 184-185, 302-307 (1987). The need for a punitive remedy to deter serious wrongdoing is especially apparent in the maintenance and cure context (see *supra* Section I.A). As the Alaska Supreme Court explained:

> When a shipowner refuses to pay maintenance and cure the seaman's only alternative is a lawsuit, which is a lengthy and expensive process. During this time, the seaman may have no funds to effect his recovery, and thus may be forced to work when he should be resting. In addition, the shipowner might use a refusal to pay maintenance as a bargaining tool, forcing an impoverished

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1995) (*en banc*), or *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), and the Alaska decision was overruled by *Stone v. International Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996). The cases in this footnote are not cited for their technical validity as authorities but as evidencing the widespread view that *Vaughan* supported punitive damages.

> seaman to accept a low amount or face a lengthy court battle. Thus, the availability of punitive damages will act as a deterrent to the unscrupulous employer, and will result in more speedy resolution of maintenance and cure claims.[21]

Depriving sick and injured seamen of their traditional punitive damages remedy would have ***two*** undesirable consequences: Unscrupulous shipowners would not only be encouraged to take advantage of unrepresented or poorly represented seamen, but seamen with no Jones Act or unseaworthiness claims, and nothing to litigate save an unvarnished cause of action for maintenance and cure, would have a harder time finding a lawyer. This Court has frequently recognized that punitive damages may be necessary "when the value of injury and the corresponding compensatory award are small (providing low incentives to sue)." *Baker*, 128 S.Ct. at 2622. See also *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885) (reasoning that punitive damages in small-injury cases are desirable because otherwise "no effort would be made by the sufferer to obtain redress"); *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 35 (1889) (same); *cf. Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 16-17 (1991) (discussing *Humes* and *Beckwith*).

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[21] *Weason, supra* note 18, 706 P.2d at 310.

The Cruise Lines explain why attorneys' fees awards do not answer either of these problems. Fee awards do not constitute a sufficient deterrent because they are "blind to the conduct" of the defendant (Merits Brief at 7-8) and cannot be scaled to punish and deter "reprehensibility" (*id.* at 22). Nor will awards "based solely on the reasonable amount of time spent by the plaintiff's attorney multiplied by the reasonable hourly rate of such attorney" (*id.* at 22-23) attract high-quality lawyers to the seamen's side; such awards only take "the amount involved and the results obtained"[22] into account and are likely to be too small an inducement in pure maintenance and cure cases.

And there is another problem with relying on attorneys' fees as the only penalty for flouting maintenance and cure. Those who tout that approach sometimes try to root it in the courts' inherent authority to punish litigation abuses. ***This means that the attorneys' fees penalty "may not be used to sanction pre-litigation conduct."*** *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1503 (5th Cir. 1995) (*en banc*) (emphasis supplied).

> If attorneys' fees are awardable only for abuse of the litigation process, then the unscrupulous employer need have no fear of behaving with full recalcitrance right up to

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[22] *Glynn*, *supra* note 18, 57 F.3d at 1501 n.8 (citation omitted).

> the point when the seaman has to go to court. Conversely, an attorney advising a seaman will need to file a lawsuit as quickly as possible in order to get the potential penalty clock started. These are perverse incentives.[23]

They fly in the teeth of the fundamental policies set forth in Section I.A *supra*.

Petitioners' Brief (at 29-30) asserts that employers generally want to "do the right thing" and that there is no "empirical evidence" that an attorneys' fees penalty is insufficient. These are naive and implausible claims. We all know that Justice Holmes's "bad man's counterparts turn up from time to time." *Baker*, 128 S.Ct. at 2627. Modern seamen will thus continue to require protection "from the harsh consequences of arbitrary and unscrupulous actions of their employers, to which, ***as a class, they are peculiarly exposed.***"[24] In *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 416 (2d Cir. 1978), and *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987), the courts indicated that attorneys' fees awards are not always enough to dissuade employers from arbitrary and unscrupulous actions. See

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[23] David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 J. MAR. L. & COM. 293, 306 (2000).

[24] *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572 (1982) quoting *Collie v. Ferguson*, 281 U.S. 52, 55 (1930) (emphasis supplied).

also *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975) (discussing the risk that a shipowner might deny "vitally necessary maintenance and cure" on the "poorly founded [belief] that the seaman's injury is permanent and incurable.").

There is evidence that these courts were right. The Ninth and Fifth Circuits removed punitive damages from the quiver of maintenance and cure remedies in *Guevara, supra*, and *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995). In the wake of those decisions, some employers became notably more resistant to maintenance and cure claims. (The Cruise Lines' Merits Brief at 28-30 indicates that some employers would like to get even more aggressive.) See, e.g., *Weeks Marine, Inc. v. Bowman*, 2006 WL 2178514 at * 2 (E.D.La., May 23, 2006) (deploring "Weeks's consistently unreasonable and recalcitrant conduct throughout this entire case"); *Weeks Marine, Inc. v. Bowman*, 2004 WL 2609967 at * 3-5 (E.D.La., Nov. 17, 2004) (stating that Weeks's Risk Manager had "credibility problems" and that his conduct in the matter had been "egregiously at fault," "arbitrary and capricious"); *Moore v. The Sally J.*, 27 F. Supp. 2d 1255, 1261 (W.D.Wash. 1998) (finding that the "defendant did not follow its own company procedures when it failed to investigate" plaintiff's maintenance and cure claim and that defendant's refusal to pay was "willful and persistent"); *Charpentier v. Blue Streak Offshore, Inc.*, 1997 WL 426093 at * 5-6, 9 (E.D.La., July 29, 1997) (detailing lengthy course of "callous" mistreatment of

seaman, causing him severe economic dislocation and "uncertainty and prolonged mental anguish"); *Spell v. American Oilfield Divers, Inc.*, 722 So.2d 399, 405 (La.App. 1998) (finding that the employer's handling of the maintenance and cure claim was "recalcitrant" and "egregious fault" and noting that the employer's "claims adjuster admitted that the [employer's] attorney told him to ignore" medical information favoring the seaman's claim).

It thus appears that the threat of punitive damages is needed to dissuade unscrupulous shipowners from aggressive overreaching. It may also be needed to encourage the conscientious consideration of "close or unclear cases." See the Cruise Lines' Cert. Brief at 15. Expanding employers' comfort zone for resolving doubts against ill and injured seamen would run completely counter to the policies at the heart of maintenance and cure.

> Punitive damages are meant as a threat to discourage egregious misconduct. If the threat is well-designed, such damages should not have to be actually awarded very often. We want the threat to ***work***.[25]

If that salutary threat had been part of the law governing the cases catalogued in the preceding paragraph, at least some of the worst abuses shown there would probably have been deterred, the seamen

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[25] Robertson, *supra* note 11, at 162-163 (emphasis in original).

would have been better protected, and protracted and expensive litigation could have been avoided.

### F. *Baker* Supports the Decision Below

Because seamen are "emphatically the wards of the Admiralty,"[26] courts have always been assiduous in protecting their rights.[27] This – along with the fact that 19th-century courts often awarded punitive damages against shipowners who flouted their maintenance and cure duties (see *supra* Section I.B) – confirms that if punitive damages are ever justified under general maritime law, and they are, that justification is at its ***strongest*** in the maintenance and cure context.[28] *Baker*'s recognition that commercial fishermen may recover maritime punitive damages lends powerful support to this proposition.[29]

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[26] *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 620 (1827). This Court has referred to seamen as the "wards of admiralty" in at least 23 decisions. See WestLaw's SCT data base and search "wards" /s "admiralty."

[27] See David W. Robertson, Steven F. Friedell, & Michael F. Sturley, *Admiralty and Maritime Law in the United States* 163-164 (2d ed. 2008) (noting that "nineteenth-century seamen led miserable lives" and that "[t]he main protectors of seamen have been the federal admiralty courts.").

[28] See *In re Amtrack "Sunset Limited" Train Crash*, 121 F.3d 1421, 1429 (11th Cir. 1997) (instancing "willful failure to furnish maintenance and cure" as the clearest case for maritime punitive damages). See also Robertson, *supra* note 11, at 163.

[29] In this connection, it will be remembered that *Baker* cited *Union Oil Co. v. Oppen*, 501 F.2d 558 (C.A.9, 1974) for the principle

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## II. Petitioners' and the Cruise Lines' Arguments Are Insupportable

### A. Petitioners' Contention That the Jones Act Precludes Respondent's Access to Punitive Damages is Refuted by *Pacific S.S. Co. v. Peterson*

Petitioners' Brief (at 7, 16-20, 25, 28) makes the sweeping contention that Congress stripped seamen of their right to punitive damages when it passed the Jones Act (currently codified as 46 U.S.C. § 30104). As we saw in subsections I.B and I.C *supra*, this is simply wrong. That Act does not address punitive damages. In *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-139 (1928), this Court explicitly held that the Jones Act "was not intended to restrict ***in any way*** the long-established right of a seaman to maintenance, cure and wages" (emphasis added). As we will explain (in Section II.B.3 *infra*), the remedy of punitive damages cannot be severed from that long-established right.

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that commercial fishermen are excepted from the general rule that the maritime law does "not compensate purely economic harms, unaccompanied by injury to person or property." 128 S.Ct. at 2630 n.1. *Oppen*, in turn, justified this exception on the grounds that "fishermen have been treated as seamen for purposes of enforcing their rights against the fishing vessel and its owner", 501 F.2d at 561, and "***seamen*** are the favorites of admiralty and their economic interests entitled to the fullest possible protection." *Id.* at 567 (emphasis added).

Petitioners' argument that *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), cut into *Peterson* is egregiously wrong. The *Miles* Court actually cited *Peterson* for the proposition that "[t]he Jones Act evinces no general hostility to recovery under maritime law." *Id.* at 29. In light of *Peterson* – and in light of the *Miles* Court's treatment of *Peterson* – there is no rational way to read the Jones Act as cutting back on the judge-made law of maintenance and cure. Even petitioners' *amici* seem to agree. See the Cruise Lines' Merits Brief at 31 (quoting this Court's statements in *Baker* that the punitive damages remedy "is itself entirely a judicial creation" and that the Court "may not slough off [its] responsibility for common law remedies because Congress has not made a first move. . . .").

### B. Petitioners' Contention that *Miles v. Apex Marine* Destroyed Respondent's Punitive Damages Remedy Is Wrong for Multiple Reasons

#### 1. *Miles* dealt solely with compensatory damages issues in tort actions by the families of seamen killed on the job[30]

The Jones Act incorporates the provisions of the 1908 Federal Employers' Liability Act (FELA), 45

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[30] This point is more fully developed in Sections II.A and II.B of the AAJ's *Amicus* Brief.

U.S.C. §§ 51-60. In *Miles*, this Court held that pre-Jones Act judicial gloss on the FELA wrongful death provision (45 U.S.C. § 51) – holding that loss-of-society damages were not recoverable – controls Jones Act wrongful death cases. 498 U.S. at 32. The Court further held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Id.* at 33. The "general maritime action" involved in *Miles* was a tort claim for unseaworthiness. In deciding that cause of action, the *Miles* Court neither decided, said, nor implied *anything* about punitive damages.

### 2. Petitioners' *Miles* argument makes three giant leaps

If *Miles* is to do any work for petitioner, it must first be expanded from the context of fatal-injury litigation to encompass actions by living seamen. The *Miles* opinion speaks loudly against this expansion. In its opening words (498 U.S. at 21) the Court stated:

> We decide whether the parent of a seaman who died from injuries incurred aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earning survives his death.

In its closing words (*id.* at 36) it stated:

> We hold that there is a general maritime cause of action for the wrongful death of a

> seaman, but that damages recoverable in such an action do not include loss of society. We also hold that a general maritime survival action cannot include recovery for decedent's lost future earnings.

In between, announcing the policy justification for its loss-of-society holding (*id.* at 33), the Court stated:

> Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

Nothing in the Court's opinion speaks to personal injury litigation.

The second expansion petitioners need is from tort to maintenance and cure. As Section II.D *infra* shows, "[m]aintenance and cure actions are not actions in tort."[31] In *Miles*, the deceased seaman's mother was suing in tort for negligence and unseaworthiness. The right to maintenance and cure was not involved, and the Court said nothing about it.

Recognizing these points, petitioners (at 22-23) try to enlist *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), for the proposition (at 20, subtitle III.A) that "the Jones Act and maintenance and cure overlap." This effort is doomed; this Court has twice explained that the two causes of action do ***not*** overlap. *Garrett v. Moore-McCormack Co.*, 317 U.S.

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[31] Robertson, Friedell & Sturley, *supra* note 25, at 176.

239, 248 n.2 (1942) ("These rights are independent and cumulative."); *Peterson*, 278 U.S. at 138 ("[T]he right to maintenance, cure and wages . . . is independent of the right to . . . compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative."). *Cortes* does not say much less hold anything to the contrary.[32]

Petitioners (at 2 and 24 n.5) next try to enlist 46 U.S.C. § 30105 to establish overlap between Jones Act actions and maintenance and cure actions. This argument is verbal sleight-of-hand. The original Jones Act is currently set forth in 46 U.S.C. § 30104. Section 30105 reiterates a 1982 statute preventing foreign oil and gas workers from invoking *any* of the U.S. laws protecting seamen.[33] Maintenance and cure are mentioned only in that context.[34]

Petitioners' third leap tries to take *Miles* from the realm of compensatory damages to the province of punitive damages. The implausibility of this leap is treated in Section II.B of the AAJ's *Amicus* Brief.

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[32] See the explanation of *Cortes* in Robertson, *supra* note 11, at 151-152.

[33] See generally David W. Robertson & Chari Lynn Kelly, *Protecting U.S. Oil Companies from Lawsuits Brought by Foreign Oil and Gas Workers: A Report on the Effects of the 1982 Amendment to the Jones Act*, 21 REV. LITIG. 309 (2002).

[34] See Robertson, *supra note* 11, at 148-149 n.437.

### 3. *Baker* refutes petitioners' *Miles* argument

Although petitioners concede (at 7-8) that *Miles* does not impair the basic cause of action for maintenance and cure, it pretends that *Miles* somehow cuts into the remedies whereby that cause of action is enforced. In *Baker*, this Court rejected a virtually identical argument. After conceding that the Clean Water Act (CWA) "does not displace compensatory damages for consequences of water pollution, even those for economic harms", 128 S.Ct. at 2619, Exxon (the shipowner in that case) argued strenuously that the CWA had nonetheless preempted any recourse to punitive damages. Retorted this Court:

> [Exxon's] concession [that the CWA does not displace compensatory remedies] leaves Exxon with [an] untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. But nothing in the statutory text points to fragmenting the recovery scheme that way, and ***we have rejected similar attempts to sever remedies from their causes of action***. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256 (1984).

*Id.* (emphasis supplied). In *Silkwood*, the Court held that a state-law punitive damages remedy could coexist with federal statutes regulating nuclear safety because the state-law remedy would neither create an "irreconcilable conflict" with nor "frustrate the objectives of the federal law." 464 U.S. at 256. Petitioners

make no effort to show that the maritime punitive damages remedy conflicts with or frustrates the objectives of any federal law.

### C. Petitioners' Principal Lower-Court Authorities Distort *Vaughan*

Taking the view that since the Stewart-Harlan opinion was labeled a dissent the majority must be read as opposing (or at least as providing no support for) punitive damages, the Fifth and Ninth Circuits rejected *Vaughan*'s authority. See *Guevara*, 59 F.3d at 150; *Glynn*, 57 F.3d at 1503-1504 & n.12. The *Guevara* court admitted that this was a "revisionist" view of *Vaughan*.[35] As we saw in subsection I.D *supra*, it was also erroneous. (For a penetrating analysis of *Guevara*, see David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 J. MAR. L. & COM. 293, 294-309 (2000).)[36]

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[35] The panel decision in *Guevara*, 34 F.3d 1279 (5th Cir. 1994), followed prior authority and upheld the seaman's punitive award. Judge Garwood concurred, urging a change in the law and arguing for what he acknowledged was a "revisionist view" of *Vaughan*. *Id.* at 1289 n.11 (quoting 6 MOORE'S FEDERAL PRACTICE § 54.78[3] at 54-506 (2d ed. 1986)). Judge Garwood was subsequently able to persuade the *en banc* court to adopt his views. See 59 F.3d at 1500 (acknowledging the sway of "Judge Garwood's well-considered concurrence to the panel opinion").

[36] Petitioners (at 10 n.3) try to get rid of *Vaughan* by citing seven decisions of this Court as showing that *Vaughan* "represents one of the exceptions to the America [sic] Rule, nothing

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### D. Petitioners' Suggestion That Maintenance and Cure Actions Are Claims for Breach of Contract Is Mistaken

Petitioners (at 25-26) suggest that punitive damages cannot lie in maintenance and cure actions because of the general rule that punitive damages are unavailable in contract. But the claim for maintenance and cure cannot be pigeon-holed in this fashion; it is *sui generis*, neither tort nor contract. Indeed, "the seaman's right [to maintenance and cure] was firmly established in the maritime law long before recognition of the distinction between tort and contract." *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42 (1943). It is "annexed by law to [the shipowner-seaman] relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 372 (1932).

### E. The Cruise Lines' Policy Arguments Are Unconvincing

The Cruise Lines' suggestion (Merits Brief at 5 & n.7 and 27-28 & n.20) that punitive damages awards

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more." Petitioners' characterization distorts these decisions. As is explained in 31 J. MAR. L. & COM. at 300, these decisions were "non-admiralty cases that simply cited *Vaughan* in support of the availability of attorney's fees to penalize bad-faith abuses of the litigation process; none even intimates that is ***all*** the case stands for" (emphasis in original).

are *prima facie* undesirable is refuted by this Court's statement in *Baker* that "recent studies tend to undercut much of [the] criticism [of] American punitive damages." 128 S.Ct. at 2624. It is also refuted by the *Baker* holding itself; if punitive damages were *prima facie* undesirable, this Court would not have upheld them in the Alaska oil spill case.

The Cruise Lines next ask the Court (Merits Brief at 26) to strip seamen of their traditional punitive damage rights to stave off "[t]he threat of transoceanic forum shopping" by making U.S. law less attractive to foreign seamen. This request is misplaced for several reasons. First of all, it overlooks the fact that this Court's "*Lauritzen-Rhoditis* choice-of-law factors" already stand in the way of such forum shopping.[37] Second, it violates the spirit of the Shipowners' Liability Convention, 54 Stat. 1693, T.S. No. 951, 1939 WL 39333, which was ratified to "rais[e] the [maintenance and cure] standards of [other] nations to the American level." *Warren v. United*

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[37] In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), this Court "listed seven factors to be considered in determining" whether U.S. law may be applied to claims brought in the U.S. by foreign seamen: "(1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum." *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308 (1970), *rehearing denied*, 400 U.S. 856 (1970).

*States*, 340 U.S. 523, 527 (1951). But most importantly, it forgets that forum-shopping should be not be stemmed obliquely, by distorting substantive law, but directly and forthrightly, as Congress did in 46 U.S.C. § 30105 when it prohibited foreign oil and gas workers from invoking U.S. law's seamen's doctrines, and as this Court did in *Sinochem Int'l Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), when it fortified the federal courts' authority to dismiss cases for *forum non conveniens*.

### F. The Cruise Lines' Dismissal of *Vaughan* Is Mere Semantics

The Cruise Lines (Merits Brief at 16) center their anti-*Vaughan* argument on the *Vaughan* Court's description of the shipowner's employer's conduct, contending that "the words 'callous,' 'recalcitrant,' 'willful and persistent' . . . fall short of describing the odious behavior punitive damages are designed to deter and punish." *Baker* refutes this semantic argument by pointing out that punitive damages are awarded for a range of conduct "from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions." 128 S.Ct. at 2633. As Justice Stevens suggested, the ultimate question is not how the conduct can be labeled but whether it deserves "moral condemnation." *Id.* at 2638 (internal quotation marks and citation omitted).

Contending "that its conduct was not sufficiently heinous to merit an award of punitive damages," the defendant in *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 416 (2d Cir. 1978), made an argument similar to the Cruise Lines'. The Second Circuit rejected that argument out of hand, stating:

> We refuse to draw any distinction in degree between the pejorative adjectives employed to describe defendant's behavior in maintenance and cure cases awarding counsel fees and those used in normal punitive damages cases. There was no real difference between the type of behavior described by the majority in [*Vaughan*] to justify the award of counsel fees and by the minority to support a finding of punitive damages not limited to counsel fees. A finding of a wanton and intentional disregard of a seaman's rights would be necessary to trigger either type of award no matter what judicial epithet is employed to describe the conduct.

*Id.* In *Baker*, this Court likewise indicated that it was "skeptical" of "verbal formulations" purporting to address degrees of reprehensibility. 128 S.Ct. at 2628. The Cruise Lines do not acknowledge the debunking of "pejorative adjectives" and "judicial

epithet[s]" in *Kraljic*[38] and fail to mention *Baker* altogether.[39]

### G. The Cruise Lines Make Several Other Unconvincing Semantic Arguments

The Cruise Lines sink further into mere semantics when they claim (Merits Brief at 23-24) that the courts "diluted" the *Vaughan* blameworthiness standard in three cases. The Cruise Lines look only at those courts' statements of the blameworthiness requirement and pay no attention to the actual conduct involved.

Looking at the kinds of employer misconduct that have actually invited punishment might have

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[38] Nor do the Cruise Lines address a closely related point made by the *Kraljic* court: Actions for compensatory damages for breach of the maintenance and cure obligation require proof of negligence, nothing more. Yet the *Vaughan* Court's counsel-fees award "emphas[ized] the malice of the shipowner." 575 F.2d at 413. Those who argue that the *Vaughan* award was compensatory damages have no answer for this incongruity. See David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 J. MAR. L. & COM. 293, 306-307 (2000).

[39] Professors Gilmore and Black dismiss the idea that Justices Stewart and Harlan had a different blameworthiness standard in mind for punitive damages than the majority did for attorneys' fees, stating that "all the [*Vaughan*] Justices were seemingly in agreement that the punitive damages were recoverable ... provided that the defendant's behavior could be characterized as 'callous', 'willful', 'wanton', 'intentional', and so on." Gilmore & Black, *supra* note 15, at 313.

assuaged the Cruise Lines' fear of being sanctioned for such innocuous "mistakes" as "choosing foreign over domestic benefit schemes." Merits Brief at 4. See, e.g., *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118-1119 (5th Cir. 1984) (upholding $11,150 punitive award on determining that the employer's compensation supervisor withheld benefits because he was "disgruntle[d]" by a perceived lack of "courtesy" on the part of the seaman's doctor).

The Cruise Lines' professed fear of punitive liability for "mistakes in choosing foreign over domestic benefit schemes" is exceeded in implausibility only by their claim that an employer's "very assertion of a defense will provide the 'willfulness' upon which a crewmember will seek to base a punitive damage award." Merits Brief at 9-10. These suggestions are absurd, and the Brief provides no instances or authorities to support them.

## CONCLUSION

The Eleventh Circuit's decision should be affirmed.

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Respectfully submitted,

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